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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HEWLETT-PACKARD COMPANY,

Petitioner,

v.

DATAGATE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

KURT W. MELCHIOR
ALISON S. HIGHTOWER
NOSSAMAN, GUTHNER, KNOX & ELLIOTT
50 California Street
San Francisco, CA 94111
(415) 398-3600

ROBERT A. SKITOL*
JAMES A. MEYERS
WHITNEY L. ELLENBY
DRINKER BIDDLE & REATH
901 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 842-8800

S.T. JACK BRIGHAM III
MARCIA HOWE ADAMS
HEWLETT-PACKARD COMPANY
3000 Hanover Street
Palo Alto, CA 94303
(415) 857-1501

*Counsel of Record
Attorneys for Petitioner Hewlett-Packard Company

December 22, 1995

PRESS OF BYRON S. ADAMS WASHINGTON, D.C. 1-800-347-8208

QUESTIONS PRESENTED

1. Can an alleged "tying arrangement" be found to meet the "concerted action" requirement of Section 1 of the Sherman Act solely from evidence that the seller unilaterally said to one purchaser it would not sell the tying product unless the purchaser also bought the tied product, followed by the purchaser's purchase of the tied product?

2. In *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16 (1984), this Court stated in the context of explaining the scope of the *per se* tying rule that, "[i]f only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." In light of this statement, can a seller be found liable for *per se* unlawful tying where only one among thousands of purchasers acquiesced in the alleged tie?

3. Should the *per se* tying rule, which deems conduct unlawful without any showing of an adverse effect on competition, be abandoned?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this petition identifies all parties in the court of appeals. Petitioner Hewlett-Packard Company has no parent corporation and no subsidiary corporations other than wholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 60 F.3d 1421 (9th Cir. 1995) and is reprinted in the appendix hereto ("Pet. App.") beginning at Pet. App. 1a. The court of appeals' order denying Hewlett-Packard Company's petition for rehearing is not reported and is reprinted here at Pet. App. 24a. The district court's Order Granting Defendant's Motion for Summary Judgment is reported at 1994-2 Trade Cas. (CCH) ¶ 76,827 (N.D. Cal. 1993) and is reprinted here beginning at Pet. App. 24a.

JURISDICTION

The judgment of the court of appeals was filed on July 27, 1995 (Pet. App. 1a), and a timely-filed petition for rehearing was denied by order dated September 26, 1995 (Pet. App. 24a). This petition is being filed within 90 days of the order denying rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

A. Introduction

Petitioner Hewlett-Packard Company ("HP") manufactures, sells and services computer systems. Respondent Datagate, Inc. ("Datagate") is an independent service organization ("ISO") that competes with HP for service of HP-manufactured computer systems. Datagate alleges that HP has engaged in *per se* unlawful tying in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, because it allegedly told HP system users that it would not provide software service (the alleged tying product) unless they also purchased hardware service (the alleged tied product) from it.

After allowing Datagate full discovery, the district court found that Datagate had proffered evidence showing at most one buyer's acquiescence in the purchase of hardware service from HP under the apparent belief that it had to do so to obtain software service from HP. That buyer's purchase represented less than one-sixtieth of one percent of total purchases in the tied product market. The court held this evidence insufficient to support a tying claim and entered summary judgment for HP. The court of appeals reversed, holding that single incident, emanating from unilateral statements by the seller's personnel (thereafter corrected as not reflecting company policy), sufficient to support a finding of *per se* unlawful tying.

B. Datagate's Allegations and Course of Proceedings Below

This petition concerns Datagate's allegation that HP tied software service and hardware service.[1] Based on allegations involving two customers, Datagate claimed that "HP has represented to HP systems users that HP will not service the user's software if the user contracts with a third party for hardware maintenance." First Amended Complaint ¶ 52. The pleading nonetheless admitted that "HP retreated from its position and stated that it would provide software service even if hardware service was provided by a third party." *Id.* The district court dismissed this claim because Datagate had failed to plead coercion under a *per se* theory or, alternatively, injury to competition under the rule of reason. The court of appeals reversed, holding that "Datagate's allegations [were] sufficient to meet the liberal requirements of Fed. R. Civ. P. 8(a)(2)." *Datagate I*, 941 F.2d at 870.

On remand, Datagate declared its readiness for trial without further discovery. HP argued there was no evidence sufficient to create a triable issue as to the existence of a

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[1] This suit originally contained no tying claim or any suggestion of "concerted" action under Section 1 of the Sherman Act. Instead, it concerned Datagate's claim that HP had "monopolized" the alleged market for service of HP systems in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. After discovery, the district court dismissed that claim for lack of evidence of either injury to competition or antitrust injury to Datagate itself. The court of appeals affirmed, with the exception of one claim for injunctive relief that the district court had not specifically addressed but that, on remand, Datagate abandoned. *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864 (9th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992) ("*Datagate I*").

tying arrangement. The district court thereupon invited HP to move for summary judgment, and HP did so.

In its motion papers, HP observed that Datagate's sole evidence of alleged tying was the deposition of Robert Buckner of Rockwell International, an HP systems user. Datagate had used this single deposition to assert that, on one occasion in 1986, HP personnel told Rockwell personnel "that HP would not provide software service to Rockwell if Rockwell contracted with a third party for hardware maintenance." Second Amended Complaint ¶ 53(b). In fact, however, the deposition established that Datagate never submitted a bid for the contract at issue and that HP lost that same contract to another ISO several months later. Indeed, Datagate expressly acknowledged in its second amended complaint that HP had not actually imposed any tie on this customer. *Id.*

Datagate had previously proffered that deposition to the district court in 1987 as purported evidence that HP's alleged conduct had injured competition. The district court at that time held this one incident "insufficient as a matter of law to raise a triable issue of material fact." Order Continuing Motion and Ordering Additional Briefing on New Evidence at 5 (Oct. 23, 1987), reprinted at Pet. App. 25a, 29a. In that regard, the Rockwell contract was at most a $100,000 contract in what Datagate admitted was at least a $684,000,000 market.[2] Thus, the amount of commerce

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[2] "[T]he Rockwell hardware service contract at issue was worth approximately $100,000 per year." Pet. App. at 10a. In its opening brief to the court of appeals in its first appeal, Datagate asserted that HP had $650 million in revenues from and a 95% market share of the alleged market for servicing HP hardware. Brief for Appellant at 6 (and record citations therein), *Datagate, Inc. v. Hewlett-Packard Co.*, No. 88-

(continued...)

foreclosed by the alleged tie was, at most, about 0.015% of the alleged tied product market.

The district court also ruled that this "[o]ne person's undocumented understanding is not enough to show coercion in this context" and that "Datagate has offered no evidence showing that HP actually had a policy of tying hardware maintenance to software maintenance." *Id.* at 29a. In *Datagate I*, the court of appeals left these findings undisturbed and affirmed the resulting grant of summary judgment against that part of Datagate's case.

Reminded of this history, Datagate sought leave to take further discovery before filing a response to HP's summary judgment motion. The district court granted that request and thereafter granted a second request to the same effect, thereby giving Datagate five months in which to take all the further discovery it sought on its tying claim.

On September 30, 1993, the parties executed and filed the following stipulation "for purposes of the pending summary judgment motion": "assuming *arguendo* the existence of separate markets for software service and hardware service" for HP systems, HP "had market power in the tying product (software service) and there was a substantial volume of commerce in the tied product (hardware service)." In short, the parties stipulated for summary judgment purposes to two of the elements of a *per se* tying offense, leaving for decision the element of coerced

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[2] (...continued)
15293 (9th Cir. filed April 24, 1989). Thus, the total amount of commerce in the alleged HP hardware service market was at least $684 million.

agreements conditioning the sale of the tying product on purchase of the tied product.[3]

C. The Decisions Below

On November 17, 1993, the district court filed its Order Granting Defendant's Motion for Summary Judgment. Pet. App. 17a. The "sole issue before" it was "whether there is sufficient evidence that HP illegally tied the sale of software service to the sale of hardware service by representing to more than one or a few isolated HP system users that HP would not service the user's software unless the user also purchased hardware service from HP." Pet. App. at 20a. The district court found Datagate's "only probative evidence" to be the Buckner deposition and held that that "single incident" is "insufficient to support a tie-in claim." *Id.* at 22a. The district court quoted this Court's statement in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16 (1984), that "[i]f only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." As it then concluded, "[e]vidence that HP coerced purchasers in addition to Rockwell is necessary to withstand summary judgment." Pet. App. at 22a. Finding no such record evidence, the district court entered summary judgment for HP.

The court of appeals reversed. It treated the *Jefferson Parish* multiple purchaser statement as in essence a mere restatement of the "substantial volume of commerce" element of a *per se* tying violation. It thus held "that *Jefferson Parish* does not impose a 'multiple purchaser' requirement

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[3] Datagate never attempted to establish a rule of reason tying offense.

of general applicability. The 'not insubstantial' requirement can be satisfied by the foreclosure of a single purchaser, so long as the purchaser represents a 'not insubstantial' dollar-volume of sales." Pet. App. 1a, 10a. On that basis, it held Datagate's single-incident evidence sufficient to support a *per se* tying violation, thereby precluding summary judgment.

HP had argued to the district court as an independent ground for summary judgment that the evidence showed only unilateral statements to one purchaser that thereafter bought the "tied" product, and that such evidence failed to show an *agreement* to a tying condition between HP and that purchaser.[4] The evidence thus failed to meet the "concerted action" element of a Section 1 violation, as described in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and as applied to tying claims in other circuits. *See infra pp. 12-15.* In light of its disposition of the case, the district court did not address this argument, but HP reasserted it before the court of appeals as an independent basis for affirmance.

The court of appeals addressed and rejected that argument. In its view, HP's argument "misconstrues the application of *Monsanto* to tie-in cases," for which "the 'contract' requirement is satisfied . . . by the coerced *sales contract* for the tied item." Pet. App. at 13a (emphasis in original). Thus, "[a] showing that the buyer of the tied product was coerced by the tying arrangement into making the purchase is sufficient to show that the buyer was not

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[4] HP's service contract contained no language requiring purchase of the allegedly tied product.

merely 'acting independently.' *See Monsanto*, 465 U.S. at 764." *Id.* at 13a.[5]

On September 28, 1995, the court of appeals denied HP's petition for rehearing and suggestion for rehearing *en banc*. Pet. App. 24a.

REASONS FOR GRANTING THE WRIT

This petition presents two substantial issues of antitrust law on which the lower courts are now sharply divided in their adjudication of *per se* tying claims under Section 1 of the Sherman Act. It also presents the third issue whether the *per se* tying rule should be reexamined and now overruled.

The first issue is whether the "concerted action" requirement of Section 1 meaningfully applies to tying claims. The decision below is that a buyer's mere acquiescence in purchasing the tied product in response to a seller's unilateral statement that it would otherwise withhold the tying product is sufficient to establish concerted action for purposes of a Section 1 tying claim. This holding is contrary to *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), which requires evidence of a *conscious agreement* rather than mere acquiescence in order to establish concerted action under Section 1. It also conflicts with decisions of other courts of appeals, which have found concerted action lacking in virtually identical situations. *See infra pp. 12-15.*

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[5] Datagate also argued to the Ninth Circuit that deposition testimony of an HP employee provided further evidence of tying conduct. Since the Ninth Circuit did not reach that issue, it does not bear on the issues presented here.

The second issue is whether this Court's statement in *Jefferson Parish,* 466 U.S. at 16, about the need for more than "a single" tied purchaser to justify invocation of the *per se* tying rule, must be followed. The decision below holds that there can be a *per se* tying violation when only one buyer -- whose purchases represent but one-sixtieth of one percent of the tied product market -- acquiesced in purchasing the tied product in response to the seller's statement that it would otherwise withhold the tying product. As a matter of law, such evidence fails to show any potential for injury to competition or the competitive process.

The court of appeals was able to reach this result only by disregarding the core of this Court's antitrust jurisprudence over the past two decades. Throughout this period, the Court has repeatedly emphasized that the antitrust laws protect competition, not individual competitors. Yet, in this case, the court of appeals held that a tying claim can be sustained on a *per se* basis -- without any showing of injury to competition -- on evidence that the alleged tie forecloses the access of a seller's competitors to only a single purchaser of the tied product. This holding permits extension of the *per se* rule -- designed to obviate elaborate market inquiries in cases where the challenged conduct is manifestly anticompetitive -- to circumstances presenting no possibility of adverse effect on competition. It is directly contrary to the Court's statement in *Jefferson Parish,* 466 U.S. at 16, that "[i]f only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." It also conflicts with decisions of two other courts of appeals requiring evidence that the seller subjected multiple purchasers to the alleged tie. *See infra pp. 21-22.*

Finally, the decision below aptly illustrates the dangers created by the *per se* tying rule and thus invites reexamination of this rule. Since 1977, this Court has abandoned *per se* liability for vertical nonprice distribution restraints, most group boycotts, and resale price policies that are not the product of truly "concerted" action. In so doing, the Court has repeatedly emphasized that *per se* rules should be carefully tailored so as to apply only to conduct that is inherently anticompetitive. But, as this Court has also emphasized, tying is *not* inherently anticompetitive and indeed can be procompetitive. *See Jefferson Parish*, 466 U.S. at 11-12, 24-25; *see also id.* at 34-35 (O'Connor, J., concurring). In this case, the court of appeals has created a standard condemning, as *per se* unlawful, conduct affecting an infinitesimal portion of the tied product market. Such conduct cannot rationally be deemed inherently anticompetitive. Accordingly, this case presents an appropriate opportunity to reconsider the wisdom of the *per se* tying rule.

I. REVIEW IS NECESSARY TO CLARIFY THE CONCERTED ACTION ELEMENT OF A SECTION 1 TYING CLAIM, WHICH THE COURT BELOW MISAPPLIED IN A MANNER CONTRARY TO THE APPROACH OF OTHER CIRCUITS

In *Monsanto*, 465 U.S. at 761, this Court emphasized the "basic distinction" in antitrust law "between concerted and independent action." Specifically, "Section 1 of the Sherman Act requires that there be a 'contract, combination . . . or conspiracy"; "[i]ndependent action is not proscribed." *Id.* Thus, a "manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." *Id.* In short, it had

seemed to be settled that the mere "acquiescence" of one party in the unilateral demand of another cannot suffice to find concerted action. Rather, there must be additional evidence that "tends to exclude the possibility" that the parties "were acting independently." *Id.* at 764. Accordingly, "the antitrust plaintiff should present direct or circumstantial evidence that . . . the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).

The court of appeals improperly constricted *Monsanto*'s application to tying claims by holding that "the 'contract' requirement is satisfied in tie-in cases by the coerced *sales contract* for the tied item." Pet. App. at 13a (emphasis in original). The court disregarded the fact that HP's contracts contained no language requiring purchase of the allegedly tied product. In its view, "[a] showing that the buyer of the tied product was coerced by the tying arrangement into making the purchase is sufficient to show that the buyer was not merely 'acting independently.'" *Id.* The court of appeals thereby conflated the "coercion" and "agreement" elements of a Section 1 tying offense. Specifically, it held that Datagate had shown concerted action through evidence that HP personnel told a Rockwell employee that HP would not provide software service unless Rockwell also obtained hardware service from HP, followed by Rockwell's renewal of a hardware service contract with HP for one contract term.

In short, the court treated as irrelevant *Monsanto*'s teachings that (1) mere "acquiescence" by one party in the unilateral demand of another is insufficient to support a concerted action finding; and (2) there must be additional

evidence that "tends to exclude the possibility" of independent action and shows "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 761, 764. In so refusing to apply *Monsanto* to a tying claim, the decision below conflicts with decisions of the Fourth and Tenth Circuits.[6]

In *Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680 (4th Cir. 1992), the Fourth Circuit addressed a tying claim with many similarities to Datagate's claim here: an ISO specializing in repair of Data General computer systems alleged that Data General engaged in *per se* unlawful tying by refusing to sell or license diagnostic software to customers obtaining repair services from third parties, and thus conditioning availability of that software on a customer's purchase of repair services from Data General itself (or at least not purchasing such services from another supplier). The Fourth Circuit upheld summary dismissal of

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[6] The decision below is also contrary to this Court's definition of a tying arrangement as "'an *agreement* by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461 (1992) (quoting *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5-6 (1958) (emphasis added)). The court of appeals believed *Kodak* merely held that a manufacturer may not "*condition* the sale of the tying product upon the purchase of the tied product" whether or not there is an agreement. Pet. App. at 14a (emphasis in original). *Kodak* did not so hold. The Court there confirmed the concerted action requirement of the tying offense, but found sufficient evidence thereof in light of the fact that "Kodak entered into agreements with its equipment owners, expressly set out in its 'Terms of Sale,' that it will sell parts only to users 'who service only their own Kodak equipment.'" 504 U.S. at 463 n.8 (citing *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 619 (9th Cir. 1990), *aff'd*, 504 U.S. 451 (1992)). There was no such tying language in HP's hardware service contracts.

that claim because there was no evidence of a tying *agreement* between Data General and its customers. According to the Fourth Circuit plaintiff had to

> produce evidence of an express tying agreement or evidence that affirmatively "tends to exclude the possibility" that Data General and its customers "were acting independently" in the sales and purchases of products [quoting *Monsanto*, 465 U.S. at 764] . . . . Absent an express agreement, if the actions of Data General and its customers are "as consistent with permissible competition as with illegal conspiracy," there will be no "inference of antitrust conspiracy" [quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)].

963 F.2d at 685. The court also emphasized that: (1) the "evidence at bottom shows nothing more than a unilateral decision by Data General to license" its software to some parties but not others, *id.* at 686; (2) proffered evidence about Data General's own statements to customers was "ambiguous, and any inference from it that Data General and its service customers agreed that the customers would purchase unwanted Data General services as a condition to obtaining a license to use [its software] would be speculative," *id.* at 687; (3) "permitting trial on the basis of such evidence presents 'considerable danger' that the fundamental requirement of an antitrust conspiracy 'will be seriously eroded,'" *id.* at 687 n.15 (quoting *Monsanto*, 465 U.S. at 763); and (4) the record contained "neither 'direct [n]or circumstantial evidence that reasonably tends to prove' that Data General and its customers 'had a conscious commitment to a common scheme designed to achieve an

unlawful objective.'" *Id.* at 688 (quoting *Monsanto*, 465 U.S. at 768).[7]

The Tenth Circuit in *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992), affirmed summary judgment against a tying claim challenging defendant's policy of refusing to provide gas transportation services to plaintiffs unless they also purchased defendant's gas. It held the evidence insufficient because "a tying arrangement imposed by a single entity is not proscribed by § 1 of the Sherman Act." *Id.* at 650. And it expressly rejected the argument that the gas purchase contracts plaintiffs had executed in light of defendant's policy sufficed to establish concerted action:

> The Cities have only brought evidence that establishes Williams tied its natural gas to its transportation facilities. The Cities have not shown Williams acted in concert with any other entity. The

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[7] The court below sought to distinguish *Service & Training* by saying that "the court's holding [there] was founded on its determination that there was no evidence that the defendant had ever conditioned the sale of the software upon the purchase of its repair services." Pet. App. at 14a (citing *Service & Training*, 963 F.2d at 686). That statement is a plain misreading of the Fourth Circuit's opinion. The Fourth Circuit's emphasis at the cited page was on plaintiffs' failure to prove that Data General and its customers had "agreed" that the customers *either* would purchase repair services from Data General *or* would not purchase such services from a third party. The fact that the customers did not purchase from third parties is "at least as consistent with the legitimate and independent business decision not to purchase unneeded services as it is with an agreement not to purchase such services." *Id.* "We hold . . . that appellants have failed to raise a genuine issue of fact as to the existence of an antitrust conspiracy between Data General and its CMO customers." 963 F.2d at 686.

> Cities name only one defendant. The other parties to the allegedly illegal contracts to establish the conspiracy are the Cities themselves. We conclude the Cities have failed to make the requisite preliminary showing of a conspiracy to go forth with their tying claims under § 1 of the Sherman Act and find summary judgment is appropriate.

Id. at 650-51.[8] The court also emphasized that "unilateral" conduct cannot be challenged under Section 1 and a "'business retains the right under Section 1 to *unilaterally* announce the terms on which it will deal.'" *Id.* at 650 (quoting *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 963 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990)) (emphasis in original).

Thus, unlike the decision below, both *Service & Training* and *City of Chanute* are faithful to this Court's admonition against inferring an agreement from mere acquiescence in a seller's unilaterally stated policy. The Court in *Monsanto* established that principle in part to avoid erosion of the "*Colgate* doctrine" under which "[a] manufacturer . . . generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Id.* at 761 (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). But *Colgate* is eroded as much by treating unilateral action as *per se* illegal tying as it would be by

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[8] *See also Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 523 (8th Cir. 1987); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 670 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986).

treating such action as *per se* illegal resale price maintenance, which was at issue in *Monsanto*.[9]

"The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984). "Concerted activity subject to § 1 is judged more sternly than unilateral activity" because "[c]oncerted activity inherently is fraught with anticompetitive risk," *id.* at 768-69, while "[s]ubjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." *Id.* at 775. The decision below ignores that distinction, permits concerted action to be found from unilateral action, and thus threatens to undermine the very *Colgate* doctrine that this Court sought to protect in *Monsanto*. In short, the court of appeals' approach would make Section 1 a vehicle for treating single-firm conduct having no conceivable potential for harm of the kind the antitrust laws are intended to prevent as a *per se* violation.

This case has divided the circuits in their approaches to the concerted action element of tying claims. This Court's review would resolve this conflict and thereby clarify the application of the concerted action requirement as described in *Monsanto* to a Section 1 tying claim.

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[9] Indeed the Fourth Circuit in *Service & Training* recognized this principle in its citation to *Colgate* in support of the proposition that the "fact that Data General has selectively licensed [its software] is not evidence of an illegal tying agreement" and "Data General may lawfully license [its software] to whomever it chooses." 963 F.2d at 686.

II. REVIEW IS NECESSARY TO CLARIFY *JEFFERSON PARISH*'S SINGLE PURCHASER STATEMENT, WHICH THE COURT BELOW MISAPPLIED IN A MANNER CONTRARY TO THE APPROACH OF OTHER CIRCUITS

In *Jefferson Parish*, 466 U.S. at 16, this Court stated that "[i]f only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." The court of appeals treated this language as merely restating the volume of commerce requirement of the *per se* tying offense,[10] thus lacking any independent import.

Refusing to recognize a "'multiple purchaser' requirement of general applicability," the court held that a *per se* offense can be established "by the foreclosure of a single purchaser, so long as the purchaser represents a 'not insubstantial' dollar-volume of sales." Pet. App. at 10a. This ruling conflicts with both *Jefferson Parish* and post-*Jefferson Parish* decisions of other circuits. *See* IX Phillip E. Areeda, *Antitrust Law* ¶ 1721c1 at 276 (1991) (settled under *Jefferson Parish* and case law in the lower courts that the *per se* rule cannot apply "when there is only a single

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[10] A tying arrangement is *per se* unlawful if "the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. at 462 (quoting *Fortner Enters, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969) ("*Fortner I*")). In *Fortner I*, the Court stated that "the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, *with respect to any appreciable number of buyers within the market*" (394 U.S. at 504) (emphasis added).

buyer or transaction" affected even if "a substantial volume" of commerce is involved).

The court below focused on the fact that this Court followed the single-purchaser statement in *Jefferson Parish* with a reference to the *Fortner I* volume of commerce requirement. The court of appeals ignored the context in which the statement appears: this Court's admonitions that "application of the *per se* rule focuses on the probability of anticompetitive consequences" and that "as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation." 466 U.S. at 15-16.

The court below offered the following insight into its thinking: "The foundational principle of *per se* antitrust liability is that some acts are considered so inherently anticompetitive that no examination of their impact on the market as a whole is required"; and the requirement "that a tie-in must be more than *de minimis* should be rigorously distinguished from any supposed requirement that an otherwise *per se* illegal tying arrangement must have a substantial impact on any given market in order to be actionable." Pet. App. at 10a. But this Court has stated that a tie-in must at least present "a substantial potential for impact on competition" before it can be considered appropriate for *per se* treatment. *Jefferson Parish*, 466 U.S. at 16. Where, as here, there can be a possible effect on only a tiny fraction of one percent of the "tied" market, this standard can never be met. Moreover, the Court has not considered tying so inherently anticompetitive that no examination of market impact is required. *Jefferson Parish*, 466 U.S. at 11-12, 24-25.

The justification for unique and qualified application of the *per se* rule to tying was explained by then-Judge Breyer in *Grappone, Inc. v. Subaru of New England,* 858 F.2d 792 (1st Cir. 1988). While *Grappone* principally concerned the proper application of the "tying market power" element of the rule, its analysis of the *Jefferson Parish* rationale for *per se* treatment elucidates the import of the multiple purchaser requirement.

Grappone "read both majority and concurring opinions [in *Jefferson Parish*] as accepting the following basic propositions": (1) "the antitrust laws exist to protect the competitive process itself, not individual firms"; (2) the typical way tying "may hurt the competitive process itself is by helping to maintain or to augment pre-existing market power"; and (3) tying does not produce that effect "in any *obvious* way; one needs a more refined analysis to find the harm." 858 F.2d at 794-95 (emphasis in original). *Jefferson Parish* "provides that more refined analysis" by explaining that a seller "possessing significant market power" over the tying product may cause anticompetitive harm by reducing the price of that product (or otherwise not fully exploiting its power over that product), thus inducing buyers to accept the tie; the seller may thereby build a strong position in the tied product market, and *that position* may increase its power to charge high prices for the tying product. *Id.* at 795. In short, insofar as tying impedes competition on the merits, "it does so in the *tied* product markets." *Id.* at 796 (emphasis in original).

The First Circuit then observed that, while the *Jefferson Parish* minority would have abandoned the *per se* rule, the majority sought to breathe life "into the screening function that the preconditions" of the rule serves. *Id.* The court thereupon cited the market power requirement as one

example of a precondition serving that screening function, emphasizing the need for proof of *significant* power useable against *more* than "a few of a seller's many customers." *Id.*

The *Grappone* analysis is equally applicable to another precondition serving the same general screening function: the requirement that more than a single purchaser be affected. If, in fact, a competing seller can show no more than one purchaser lost by tying conduct, especially in a market with thousands of purchasers, there is *no* potential for "significant" increase in the defendant's power over the tied product or impairment of "competition on the merits" in the tied product market.

Professor Areeda has explained that the *Jefferson Parish* multiple purchaser statement functions as a supplementary screen, excluding from *per se* treatment those situations that pose no anticompetitive threat:

> [T]he courts recognize that their dollar-volume test is very lax and that meeting it does not itself indicate any real threat to competition. Though not yet willing to revise the test, they feel comfortable in softening its impact by requiring more than one buyer as a supplementary screen to exclude apparently de minimis cases.

Areeda, supra, ¶ 1721c1 at 278. Here, however, because the court below rejected any such multiple purchaser screen and relied entirely on the minimal volume of commerce test, it held *de minimis* conduct sufficient for *per se* liability.[11]

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[11] The court of appeals considered the multiple purchaser requirement as leading to what it called the "aberrant" result that a tying arrangement (continued...)

The decision below conflicts with post-*Jefferson Parish* decisions of the Second and Eighth Circuits holding that a single tying incident, even if sufficient to meet the volume of commerce requirement, cannot support a finding of antitrust liability. *Gonzalez v. St. Margaret's House Housing Dev. Fund Corp.*, 880 F.2d 1514, 1519 (2d Cir. 1989); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d. 1215, 1235-36 (8th Cir. 1987) ("a jury could not reasonably conclude that a tying arrangement existed" where only one buyer was allegedly forced to buy the tied product), *cert. denied*, 484 U.S. 1026 (1988).[12] And, while not specifically addressing the *Jefferson Parish* multiple purchase language, Seventh Circuit decisions have defined the *per se* tying rule to require some showing of "a substantial danger that the tying seller will acquire market power in the tied product market";[13] and recent decisions of the Fifth Circuit

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[11] (...continued)
"forcing a single sale worth millions of dollars would be perfectly legal, while an identical arrangement forcing multiple sales worth many times less would be subject to *per se* condemnation." Pet. App. at 8a-9a. There is nothing aberrant about the multiple purchaser requirement. As in this case, a single purchaser will ordinarily represent an inconsequential share of the relevant market regardless of the dollars involved. In the rare case where a single purchaser may represent a substantial share of the market, the conduct may appropriately be evaluated under the rule of reason.

[12] *See also Kingsport Motors v. Chrysler Motors Corp.*, 644 F.2d 566, 572 (6th Cir. 1981) (pre-*Jefferson-Parish* decision invoking multiple-purchaser rule); *Davis v. Marathon Oil Co.*, 528 F.2d 395, 402 (6th Cir.), *cert. denied*, 429 U.S. 823 (1976) (same).

[13] *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 674 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *Carl Sandburg Village Condominium Ass'n v. First Condominium Dev. Co.*, 758 F.2d 203, 210 (continued...)

have defined the rule to require "a likely anticompetitive effect on the tied market."[14] The decision below, endorsing *per se* liability for a single-purchaser tie entailing no conceivable potential for affecting competition generally in the tied product market, is thus at odds with tying law in all those other circuits.[15] Review is necessary to resolve this conflict.

More fundamentally, review is necessary to ensure that tying law is faithful to this Court's general antitrust jurisprudence. The decision below allows the *per se* rule to stray far from several bedrock antitrust principles: the law's purpose to protect "competition, not competitors," *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); the "antitrust injury" doctrine under which "a plaintiff can recover only if [its] loss stems from a competition-*reducing* aspect or effect of the defendant's behavior," even in cases involving alleged *per se* violations, *Atlantic Richfield Co. v.*

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[13] (...continued)
(7th Cir. 1985); *but see Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 718-19 (7th Cir. 1987), *cert. denied*, 493 U.S. 847 (1989).

[14] *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1382 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 779 (1995); *Breaux Bros. Farms, Inc. v. Teche Sugar Co.*, 21 F.3d 83, 86 (5th Cir.), *cert. denied*, 115 S. Ct. 779 (1995).

[15] Only one decision other than the decision below has held that a tie imposed on one customer was sufficient to state a Section 1 tying claim. In that case, the Eleventh Circuit distinguished *Jefferson Parish* by explaining that the customer was affected by the tying conduct with respect to seven separate transactions. *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1420 (11th Cir. 1987) ("Although an actual tying violation was proved as to only one promoter, it involved seven different events and therefore seven different tying violations").

USA Petroleum Co., 495 U.S. 328, 344 (1990) (emphasis in original) ("*ARCO*"); and the Court's admonition that "*per se* rules are appropriate only for 'conduct that is manifestly anticompetitive.'" *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (quoting *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 (1977)). The conduct here at issue, which would at most have foreclosed access to one purchaser in one transaction representing a negligible portion of the tied product market, could not be deemed anticompetitive, much less "manifestly" so.

Accordingly, the Court should grant this petition in order to affirm the message in *Jefferson Parish*, 466 U.S. at 15-16, that the court below failed to grasp: that "application of the *per se* rule focuses on the probability of anticompetitive consequences," that "as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation," and that "[i]f only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law."

III. REVIEW IS WARRANTED TO REEXAMINE AND OVERRULE THE *PER SE* TYING RULE

The two inter-circuit conflicts created by the decision below exemplify pervasive conflict and confusion that plague tying law in the lower courts. Indeed, *Kodak*, this Court's most recent tying decision, has markedly proliferated litigation throughout the area of commerce here involved by highlighting how *per se* tying claims may be asserted in "aftermarket" segments of service-intensive and technology-

intensive industries.[16] The harshness of the *per se* tying rule induces some courts to search for escapes from *per se* treatment on grounds other courts deem inconsistent with controlling law. This situation has resulted in considerable unpredictability in this part of antitrust law.

In *Jefferson Parish*, four members of this Court advocated retirement of the *per se* tying rule. As they observed, tying has never actually been treated as "*per se*" illegal in a strict sense, particularly in light of the longstanding requirement of an inquiry into "economic power" over the tying product. "The Court has never been willing to say of tying arrangements, as it has of price fixing, division of markets, and other agreements subject to *per se* analysis, that they are always illegal, without proof of market power or anticompetitive effect." *Jefferson Parish*, 466 U.S. at 34 (O'Connor, J., concurring). The concurring opinion continued:

> The '*per se*' doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement. As a result, tying doctrine incurs the costs of a rule-of-reason approach without achieving its benefits: the doctrine calls for the extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be

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[16] *See, e.g., Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147 (1st Cir. 1994); *Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194 (3d Cir.), *cert. denied*, 115 S. Ct. 684 (1994); *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993), *cert. dismissed*, 114 S. Ct. 2700 (1994); *Advanced Computer Servs., Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356 (E.D. Va. 1994); *Picker Int'l, Inc. v. Leavitt*, 865 F. Supp. 951 (D. Mass. 1994); *Triad Sys. Corp. v. Southeastern Express Sys., Inc.*, 1994-2 Trade Cas. (CCH) ¶ 70,837 (N.D. Cal. 1994).

> interpreted to prohibit arrangements that economic analysis would show to be beneficial. Moreover, the *per se* label in the tying context has generated more confusion than coherent law because it appears to invite lower courts to omit the analysis of economic circumstances of the tie that has always been a necessary element of tying analysis.

Id. at 34-35. For those reasons, the concurring Justices concluded that the time had come "to abandon the '*per se*' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have." *Id.* at 35.

The *per se* rule against tying makes no sense. As then-Judge Breyer explained in *Grappone*, the competitive evil of tying is that it may cause anticompetitive effects in the *tied* product market. Thus, in their recently issued *Antitrust Guidelines for the Licensing of Intellectual Property*, 4 Trade Reg. Rep. (CCH) ¶ 13,132 (April 6, 1995), the Department of Justice and Federal Trade Commission stated that they would be likely to challenge a tying arrangement involving intellectual property only if, *inter alia*, "the arrangement has an adverse effect on competition in the relevant market for the tied product." *Id.* § 5.3. Perversely, however, the *per se* rule against tying does not examine competitive effects in the tied product market at all. The only inquiry with respect to the tied product market is whether a substantial volume of commerce -- a *de minimis* test -- is involved. As this case demonstrates, the fact that a substantial volume of commerce in the tied product market may be involved says nothing about effects on *competition* in that market.

Judicial experience with tying litigation over the decade since *Jefferson Parish*, and particularly over the three years

since *Kodak*, makes all the more desirable today a reexamination of the *per se* tying rule. The decision below provides an appropriate vehicle for doing so, for it highlights how the *per se* rule can lead to misuse of antitrust law. Specifically, the law as now interpreted by the Ninth Circuit permits a finding of a *per se* violation on the basis of a single instance of unilateral conduct directed at one purchaser whose consumption represents less than 0.015% of total purchases in the "tied" market. The conduct that the court of appeals held requires a jury trial could not conceivably have affected competition, and its prosecution could not conceivably serve the purpose of antitrust law.

The *per se* tying rule has become a dangerous anomaly, at odds with the entire thrust of the Court's antitrust jurisprudence since 1977. Since then, the Court has eliminated the *per se* rule for vertical resale restrictions generally, with the exception of truly concerted resale price maintenance. Tying, of course, is a vertical nonprice restriction. In *GTE Sylvania*, the Court abandoned the *per se* rule for other vertical nonprice restraints, concluding that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing." *GTE Sylvania*, 433 U.S. at 58-59. In *Monsanto* and again in *Business Electronics*, the Court carefully narrowed application of the *per se* rule against resale price maintenance to ensure it reached only genuinely concerted activity and did not erode the *Colgate* doctrine. And, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), the Court even abandoned the *per se* rule with respect to a horizontal restriction, terminating its application to most concerted refusals to deal.

Similarly, the Court has emphasized that the proper focus of any antitrust doctrine should be on competitive effects. Thus, in *ARCO*, the Court made clear that "antitrust injury" does not arise, and antitrust standing to sue is not present, "until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct," and that this principle applies "regardless of the type of antitrust claim involved." 495 U.S. at 339-40 (emphasis in original). *See also Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 892 (1993) ("the conduct of a single firm [is] unlawful only when it actually monopolizes or dangerously threatens to do so"); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2589 (1993) ("[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws," for "those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce'") (quoting *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945)).

Even in the tying area, this Court has admonished that "as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation." *Jefferson Parish*, 466 U.S. at 16. As the decision below highlights, however, some lower courts have not heeded that admonition, upholding *per se* tying claims in circumstances in which there is *no* potential for impact on competition.[17] Abandonment of the *per se* tying rule would

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[17] In *Virtual Maintenance*, for example, the Sixth Circuit upheld a plaintiff ISO's *per se* claim that a computer manufacturer had unlawfully tied hardware maintenance and software support while nonetheless rejecting plaintiff's rule of reason tying claim precisely because plaintiff (continued...)

preclude such aberrant results and would harmonize tying law with the core principles of antitrust law that this Court has consistently elucidated since *GTE Sylvania*.

This Court has held that the *per se* rule should be limited to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978). In *Jefferson Parish*, even the majority of the Justices who did not agree that the *per se* rule against tying should be abandoned nevertheless recognized that the nature and necessary effect of tying are not "plainly anticompetitive." The majority there stated that "not every refusal to sell two products separately can be said to restrain competition. . . . Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively -- conduct that is entirely consistent with the Sherman Act." 466 U.S. at 11-12. *See also id.* at 24-25 ("there is nothing inherently anticompetitive about packaged sales. . . . The fact that petitioners' patients are required to purchase two separate items is only the beginning of the appropriate inquiry"); *id.* at 21 n.34 ("The

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[17] (...continued)
had "failed to demonstrate a substantial threat that Prime would acquire market power in the most narrowly defined tied product market." 11 F.3d at 664. In a prior opinion, *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 957 F.2d 1318 (6th Cir.), *remanded*, 113 S. Ct. 314 (1992), the Sixth Circuit had found that the tying arrangement at issue foreclosed 400 out of approximately 23,000 computer systems within the most narrowly defined tied product market. As the court there concluded, "foreclosure of only about 400 computer systems out of the thousands of systems" in the relevant tied market "is insignificant as a matter of law. Consequently, Prime's tie-in did not have anticompetitive effects" in that market. *Id.* at 1330.

legality of petitioners' conduct depends on its competitive consequences, not on whether it can be labeled 'tying.'").

The *per se* rule against tying chills conduct that may be procompetitive (or at worst competitively neutral) because it imposes treble-damage liability without even asking whether there has been an anticompetitive effect or whether there is a legitimate business or efficiency justification for the conduct at issue. Indeed, conduct of the very sort at issue here can be procompetitive. For example, in *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1184-89 (1st Cir. 1994), the First Circuit held that Data General's refusal to license its diagnostic software to third parties performing hardware maintenance -- a practice challenged as both monopolization under Section 2 and as *per se* unlawful tying under Section 1 -- was presumptively *not* exclusionary. It added that the development of new products made possible by Data General's policy conferred "a significant benefit to owners" and "increased the efficiency and reduced the cost of service." *Id.* at 1189. And it stated that labeling such conduct as exclusionary "would 'discourage progressiveness.'" *Id.* at 1188 (quoting III Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 706 at 127-28 (1978)).

Similarly, the Justice Department and the Federal Trade Commission recently stated that tying arrangements can "result in significant efficiencies and procompetitive benefits." *Antitrust Guidelines for the Licensing of Intellectual Property*, *supra*, § 5.3. Thus, rather than condemn such arrangements *per se*, these antitrust enforcement agencies will challenge a tying arrangement involving intellectual property only if (1) the seller has market power in the tying product; (2) the arrangement injures competition in the tied product market; *and*

(3) efficiency justifications for the arrangement do not outweigh its anticompetitive effects. *Id.*

Since tying is not inherently anticompetitive and can be procompetitive, it makes no sense to have a *per se* rule against tying. Accordingly, review is appropriate in order to abolish the *per se* tying rule.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Kurt W. Melchior
Alison S. Hightower
NOSSAMAN, GUTHNER, KNOX & ELLIOTT
50 California Street
San Francisco, CA 94111
(415) 398-3600

Robert A. Skitol*
James A. Meyers
Whitney L. Ellenby
DRINKER BIDDLE & REATH
901 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 842-8800

S.T. Jack Brigham III
Marcia Howe Adams
HEWLETT-PACKARD COMPANY
3000 Hanover Street
Palo Alto, CA 94303
(415) 857-1501

**Counsel of Record*

Attorneys for Petitioner Hewlett-Packard Company

December 22, 1995

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DATAGATE, INC.,	)	
	)	
Plaintiff-Appellant,	)	No. 93-17276
	)	
v.	)	D.C. No.
	)	CV-86-20018-RPA
HEWLETT-PACKARD CO.,	)	
	)	
Defendant-Appellee.	)	OPINION
	)	

Appeal from the United States District Court

for the Northern District of California
Robert P. Aguilar, District Judge, Presiding

Argued and Submitted
June 14, 1995--San Francisco, California

Filed July 27, 1995

Before: Alfred T. Goodwin, Mary M. Schroeder
and Robert R. Beezer, Circuit Judges.

Opinion by Judge Beezer

OPINION

BEEZER, Circuit Judge:

We consider whether a tying arrangement foreclosing a single customer can ever affect a "not insubstantial" volume of commerce and so be illegal *per se* under the Sherman Act, § 1 (15 U.S.C. § 1). Datagate, Inc. appeals the district court's order granting summary judgment in favor of Hewlett-Packard Company. ("HP") on Datagate's claim that HP imposed illegal tying arrangements on its customers. The district court held that Datagate had presented evidence sufficient to establish a material issue of fact as to only a single tying arrangement, affecting one customer, and that this was insufficient as a matter of law to affect a "not insubstantial" amount of commerce under *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16 (1984). We have jurisdiction over Datagate's timely appeal, 28 U.S.C. § 1291, and we reverse.

I

Datagate is an independent service organization ("ISO") which engages in the maintenance and repair of HP computer equipment ("hardware service"). HP competes with Datagate and other ISOs in the market for the provision of hardware service. HP also provides support services for the proprietary operating systems and applications software which are necessary to operate its computer equipment ("software service"). The provision of software service requires the use of HP's proprietary materials.

Datagate sued HP alleging numerous violations of the antitrust laws arising from HP's conduct in the hardware service market. The district court granted summary judgment for HP on all Datagate's claims. We affirmed in part, reversed in part and remanded. *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864 (9th Cir. 1991) (*"Datagate I"*), *cert. denied*, 503 U.S. 984 (1992). We remanded two of Datagate's claims to the district court: One alleging that HP had illegally imposed tying arrangements on its customers, in violation of the Sherman Act, § 1, by refusing to provide software service unless the customers also purchased hardware service from HP, and a second claim for injunctive relief under the Clayton Act, § 16 (15 U.S.C. § 26).

On remand, Datagate abandoned the claim for injunctive relief. HP again moved for summary judgment on the tie-in claim, and Datagate requested and received two continuances for further discovery on that claim. For the purposes of the summary judgment motion, the parties entered into the following stipulation: "assuming arguendo the existence of separate markets for software service and hardware service for HP minicomputers, defendant [HP] had market power in the tying product (software service) and there was a substantial volume of commerce in the tied product (hardware service)." The district court then granted summary judgment for HP.

The district court determined that the uncontroverted evidence in the record was sufficient to create a triable issue of fact as to whether HP had imposed a tying arrangement on Rockwell International ("Rockwell"), one of its

customers. The court further determined that Datagate's evidence failed to establish a triable issue of fact as to the existence of any additional tying arrangements allegedly imposed by HP. Quoting from *Jefferson Parish*, the district court held that a tying arrangement imposed on only a single customer was insufficient as a matter of law to support Datagate's tie-in claim: "If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of anti-trust law." *Jefferson Parish*, 466 U.S. at 16.

Datagate appeals.

II

We review *de novo* the district court's order granting summary judgment; *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1432 (9th Cir. 1995).

III

The district court interpreted *Jefferson Parish* to mean that, as a matter of law, a tying arrangement imposed on a single customer is always *de minimis*, and not of concern to the antitrust laws. The district court read *Jefferson Parish* too broadly.

A

A tying arrangement is a device used by a competitor with market power in one market (for the "tying" product)

to extend its market power into an entirely distinct market (for the "tied" product). To accomplish this, the competitor agrees to sell the tying product (here software service) only on the condition that its customers also purchase the tied product (in this case hardware service). The competitor thus uses its market power in the tying product to coerce the customer into purchasing the tied product. This is one of the few practices that the Supreme Court has determined to be illegal *per se* under the Sherman Act, § 1. See *Jefferson Parish*, 466 U.S. at 9-10.

[1] Three elements must be satisfied to establish that a tying arrangement is illegal *per se*: (1) a tie-in between two products or services sold in different markets, (2) market power in the tying product, and (3) the tying arrangement affects a not insubstantial volume of commerce. *Bhan v. NME Hosps. Inc.*, 929 F.2d 1404, 1411 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991). For the purposes of the summary judgment motion, the parties unquestionably stipulated to the second element: HP's market power in the tying product.

The parties dispute exactly which of the other elements is at issue in this appeal. Datagate argues that the third element is at issue: whether a "not insubstantial" volume of commerce was affected by HP's single alleged tying arrangement. While continuing to press its argument under *Jefferson Parish*, HP contends that the parties stipulated to the third element, and that the *Jefferson Parish* analysis either goes to the first element of whether HP imposed a tie-in at all, or creates a fourth requirement of multiple tying arrangements.

[2] First, the parties did not stipulate to the third element. Although the district court stated that the parties stipulated that "a tying arrangement imposed by HP would affect a substantial volume of commerce in the tied market," that is not what the parties' stipulation says. The parties simply stipulated that there *was* a substantial volume of commerce in the tied market, not that any tie-in by HP would affect a substantial volume. At oral argument, HP declined to concede that any tying arrangement it might have imposed would have affected a not insubstantial amount of commerce. Thus, the parties' stipulation establishes only the second element.

Second, the crucial language from *Jefferson Parish* goes to the "not insubstantial" requirement, rather than bearing in some way on the first element, or creating an entirely new element, as HP urges. The dispositive issue in *Jefferson Parish* was whether the defendant had market power, and thus whether it could effectively impose a tying arrangement. *See* 466 U.S. at 26. The "single purchaser" language relied upon by the district court and HP appeared in a section of the opinion discussing the background of *per se* liability for tie-ins:

> Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation. If only a single purchaser were "forced" with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law. It is for this

> reason that we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby. (citing cases)

Jefferson Parish, 466 U.S. at 16. One of the cases the Court cited in the above passage was *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501-02 (1969) (*"Fortner I"*). The cited pages from *Fortner I* concern *only* the meaning of the "not insubstantial" requirement. *Id.* In context, it cannot seriously be questioned that the *Jefferson Parish* Court was discussing the same requirement.

We must determine whether Datagate brought forth enough evidence to create a disputed issue of material fact regarding the first and third elements.

B

[3] Whichever element is involved, HP argues that a tying arrangement foreclosing only one purchaser can never be *per se* illegal. Construing HP's argument to be that a tying arrangement affecting only a single purchaser is insubstantial as a matter of law, we disagree.

We agree with Datagate that the Supreme Court did not intend the above-quoted language from *Jefferson Parish* to create a "single purchaser" rule of general applicability. The Court's statement must be read in conjunction with the facts of the case, which involved the market for anesthesiology services. *See Jefferson Parish*, 466 U.S. at 22. The foreclosure of a single purchaser in that market

(*i.e.* one patient in a single surgical procedure) would involve only several hundred dollars. Again, the Court's citation to *Fortner I* is helpful. In that case, the Court explained at some length the meaning of the "not insubstantial" requirement:

> The requirement that a "not insubstantial" amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie . . . . An analysis of market shares might become relevant if it were alleged that an apparently small dollar-volume of business actually represented a substantial part of the sales for which competitors were bidding. But normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie . . . .

Fortner I, 394 U.S. at 501. Read with reference to *Fortner I*, the Court's statement in *Jefferson Parish* means simply that on the facts of that case, where a single purchaser represented neither a substantial dollar-volume nor a substantial portion of the relevant market, the foreclosure of a single sale would be *de minimis*.

A broader reading of the Court's statement would be unwarranted, and would lead to aberrant results. Under HP's interpretation, a tying arrangement forcing a single sale

worth millions of dollars would be perfectly legal, while an identical arrangement forcing multiple sales worth many times less would be subject to *per se* condemnation. We do not believe this is the rule that the Court intended.

HP's reliance on *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985) is misplaced. That case did not hold, as HP states, that *Jefferson Parish* imposed a threshold "single purchaser" rule. The issue decided by *Digidyne* was whether the "not insubstantial" element included a requirement that a substantial portion of the market in the tied product affected. *See id.* at 1341. Relying on the above-quoted passage from *Fortner I*, we concluded that such a showing was not required. *Id.* It was undisputed in *Digidyne* that multiple purchasers were involved; that case is not controlling here.

[4] The remainder of HP's argument on this issue, analogizing to cases involving antitrust standing, misses the point.[1] HP contends that the "single purchaser" rule is required in order to ensure that only tie-ins with substantial anticompetitive effects in the relevant market are proscribed. Such is not the law. The foundational principle of *per se* antitrust liability is that some acts are considered so

---

1. Datagate's standing to sue under the antitrust laws is not at issue in this appeal. HP did not contend before the district court that Datagate had not suffered causal antitrust injury. Unlike Article III standing, the question of standing to sue under the antitrust laws does not go to subject matter jurisdiction, and thus need not be considered *sua sponte*. *See Rebel Oil*, 51 F.3d at 1433 (question of causal antitrust injury goes to scope of protection afforded by antitrust laws).

inherently anticompetitive that no examination of their impact on the market as a whole is required. *See Fortner I*, 394 U.S. at 501. The requirement in the cases that a tie-in must be more than *de minimis* should be rigorously distinguished from any supposed requirement that an otherwise *per se* illegal tying arrangement must have a substantial impact on any given market in order to be actionable. *See Digidyne*, 734 F.2d at 1341.

[5] We hold that *Jefferson Parish* does not impose a "multiple purchaser" requirement of general applicability. The "not insubstantial" requirement can be satisfied by the foreclosure of a single purchaser, so long as the purchaser represents a "not insubstantial" dollar-volume of sales.

IV

[6] Applying this rule to the evidence in the record, we conclude Datagate has brought forth enough evidence that Rockwell represented a "not insubstantial" dollar-volume of hardware service sales to survive summary judgment.

[7] In opposition to summary judgment, Datagate submitted the declaration of its president that the Rockwell hardware service contract at issue was worth approximately $100,000 per year. HP does not argue that this *dollar-volume* is insubstantial, concentrating instead on its single purchaser theory.

[8] This amount is sufficient. *See Moore v. James H. Matthews & Co.*, 550 F.2d 1207, 1216 (9th Cir. 1977) ("The 'not insubstantial' test has been met by showing dollar

volumes which total $60,800, and estimated sales of $86,376." (citations omitted)). Even adjusting these holdings for inflation, a dollar volume of $100,000 per year for an unspecified number of years would hardly be *de minimis*.

V

HP argues that the evidence in the record is insufficient to establish even the single Rockwell tying arrangement. We disagree. It is common ground that, on summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Rebel Oil*, 51 F.3d at 1432.

The "essential characteristic" of a *per se* illegal tying arrangement is that the seller makes use of its market power in the tying product to coerce the buyer to purchase the tied product. *Jefferson Parish*, 466 U.S. at 12-13; *see also Datagate I*, 941 F.2d at 870 (seller must have "coerced to some extent the purchaser into buying the tied product." (citation omitted)).

Datagate submitted to the district court the deposition testimony of Robert Buckner, a Rockwell employee responsible for the procurement of hardware services on HP equipment owned by Rockwell. Buckner testified that, in late 1985 or early 1986, he spoke to two HP employees who told him that HP would not provide software service if Rockwell purchased hardware service from a third party. Buckner also testified, when asked what "impact" HP's refusal to provide software service would have on Datagate's ability to win Rockwell's hardware service contract, that

"[Rockwell] could not afford to do without our software maintenance." Finally, Datagate's president declared that Datagate's prices for hardware maintenance were significantly below HP's.

[9] Read in the light most favorable to Datagate, this uncontroverted evidence is sufficient to establish a disputed issue of material fact as to whether HP imposed a coercive tying arrangement on Rockwell. It can readily be inferred from Buckner's testimony that HP's threat to withhold software service precluded Rockwell from considering other providers of hardware service. Buckner's testimony also indicates that, although he had reservations, he was interested in purchasing hardware service from a provider other than HP until he learned that HP would refuse to provide software service. Finally, the fact that Datagate's prices for hardware service were lower than HP's supports the inference that HP's threats to some extent coerced Rockwell into making a purchase from HP it would not have made on the open market. *See Jefferson Parish*, 466 U.S. at 14-15 (explaining that the primary harm from tying arrangements is the impairment of competition on the merits in the market for the tied product).

[10] HP argues that the allegation in Datagate's complaint that HP "retreated" from its tie-in position constitutes an admission which undermines Datagate's claim. HP is incorrect. That HP eventually stopped tying software services to the purchase of hardware services does not defeat any claim Datagate may have against HP based on purchases foreclosed during the period HP allegedly did have a tie-in policy. For the same reason, HP is not helped by Buckner's

deposition testimony that, several months after two HP employees told him of the tie-in policy and Rockwell entered a hardware service contract with HP, a different HP employee told him that there was no such policy. That testimony is consistent with a change in HP policy, after the tying arrangements had already coerced Rockwell into purchasing hardware services from HP.

HP argues that Datagate failed to present sufficient evidence of a "contract, combination . . . or conspiracy" to survive summary judgment under *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). HP misconstrues the application of *Monsanto* to tie-in cases. HP is correct that, under *Monsanto* and the plain language of the Sherman Act, a "contract, combination . . . or conspiracy" in restraint of trade is required to establish a violation of § 1. 15 U.S.C. §1; *Monsanto*, 465 U.S. at 761. What HP fails to recognize is that the "contract" requirement is satisfied in tie-in cases by the coerced *sales contract* for the tied item. *See Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 191-92 (2d Cir. 1992) ("A tying arrangement is 'an *agreement* by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product.'") (citations omitted, emphasis added). A showing that the buyer of the tied product was coerced by the tying arrangement into making the purchase is sufficient to show that the buyer was not merely "acting independently." *See Monsanto*, 465 U.S. at 764.

This is illustrated by the Fourth Circuit's decision in *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680 (4th Cir. 1992), upon which HP relies. In that case, the

plaintiff alleged that the defendant computer manufacturer's policy of licensing diagnostic software only to users that serviced their own equipment was an illegal tie-in between the software and repair services. *Id.* at 682-83. The court cited extensively to *Monsanto* in holding that the plaintiff had not made out a tie-in claim. *Id.* at 685-86. However, the court's holding was founded on its determination that there was no evidence that the defendant had ever conditioned the sale of the software upon the purchase of its repair services. *Id.* at 686. In other words, the defendant had never forced anyone to buy the tied product. What *Monsanto* requires is evidence of a coerced agreement to purchase the tied product. *See id.* at 685 & n.11. Datagate has brought forth sufficient evidence of such a tie-in to survive summary judgment.

HP's reference to unilateral refusal to deal cases similarly misses the point. HP relies heavily on a footnote in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072 (1992). There, the Supreme Court stated: "Assuming, *arguendo*, that Kodak's refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, its alleged sale of parts to third parties on condition that they buy service from Kodak is not." *Id.* at 2080 n.8. This simply means that, for the purposes of tie-in analysis, the defendant may sell the tying product to anybody or nobody at all. What it may not do is *condition* the sale of the tying product upon the purchase of the tied product, thereby expanding its market power into the market for the tied product. The harm from tying arrangements is the forced sale of the *tied* product, not the withholding of the tying product. HP does not argue that it

had some legitimate policy of unilaterally refusing to sell software services to certain parties. *Kodak* does not help HP.

Finally, HP's "law of the case" argument is meritless. In refusing to reconsider its original pre-remand summary judgment order, the district court commented that Buckner's testimony was "insignificant" and "not enough to show coercion in this context." These comments went to the determination of whether HP's conduct had a large enough impact on the hardware service market to be anticompetitive under a rule of reason analysis. *See Datagate I*, 941 F.2d at 868-69 (discussing antitrust standing). As discussed above, if HP's conduct was *per se* illegal, it was also *per se* anticompetitive. At the time the district court made the observations quoted by HP, it had already dismissed Datagate's tie-in cause of action for failure to state a claim. The court's comments, made on summary judgment, could not be a dispositive ruling on a legal issue not before it.

[11] Despite HP's persistent attempts to obfuscate the applicable legal standards, we hold that Datagate presented evidence sufficient to create a factual dispute as to whether HP coerced Rockwell into purchasing its hardware services by threatening to withhold software services.[2]

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2. Datagate argues that, even if there is a "multiple purchaser" requirement, it presented evidence sufficient to create a disputed issue of material fact regarding more than a single tying arrangement. As we have concluded that Datagate's tie-in claim survives summary judgment on the basis of the disputed issues of material fact concerning the alleged Rockwell tying arrangement, we need not address Datagate's alternative argument.

VI

We conclude that *Jefferson Parish* does not create a "single purchaser" rule of general applicability. There are disputed issues of material fact that preclude summary judgment for HP. The judgment of the district court is REVERSED and the case is REMANDED to that court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DATAGATE, INC.,	)	
	)	
Plaintiff,	)	**No. C86-20018 RPA**
	)	
v.	)	**ORDER GRANTING**
	)	**DEFENDANTS**
HEWLETT-PACKARD CO.,	)	**MOTION FOR**
	)	**SUMMARY JUDGMENT**
Defendant.	)	
	)	
	)	

Defendant Hewlett-Packard Company ("HP") moves this Court pursuant to Fed. R. Civ. P. 56 for an order granting summary judgment in its favor with respect to Plaintiff Datagate Inc.'s ("Datagate") tie- in claim on the ground that Plaintiff lacks sufficient evidence to support such a claim. Defendant further moves for summary judgment on Plaintiff's claim for permanent injunctive relief. For the reasons set forth below, Defendant's motion for summary judgment is GRANTED.

BACKGROUND

HP manufactures, sells, and services computer systems. HP offers both hardware and software maintenance support for its systems. Datagate is an independent service organization ("ISO") which specializes in providing hardware maintenance service for HP systems. As an ISO, Datagate competes directly with HP for the hardware maintenance business of HP system users. ISO's have thrived over the last decade by offering maintenance services at significantly lower prices than the computer manufacturers.

Datagate has alleged that it and other ISOs which service HP products cannot provide software support because such support requires the use of HP proprietary materials. Datagate claims that beginning in 1983, HP, as part of a scheme to drive out of business those ISOs which service HP hardware, started tying its software support to its hardware support. Pursuant to this alleged strategy, if an HP system user hired an ISO instead of HP to provide hardware maintenance, HP would refuse to provide the customer with software service. This tying arrangement, according to Datagate, forced many of its customers to switch to using HP's hardware service, thereby damaging Datagate's business. Datagate's complaint also contains a claim for permanent injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26.

While HP stipulates for purposes of this motion that it had market power in the tying product (software service) and that there was a substantial volume of commerce in the tied product (hardware service) - requisite elements of a tie-

in claim - it argues that there is no evidence that it imposed tying arrangements on its customers.

DISCUSSION

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper if no factual issues exist for trial. To survive a motion for summary judgment, the non-moving party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-249, 10 S.Ct. 2505, 2510 (1986). In addition, the nonmoving party must demonstrate that the factual dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the non-moving party. Id. "Although summary judgment is generally disfavored in anti-trust litigation, it is appropriate when the non-moving party does not show any issues of material fact and does not present an adequate record to support a finding in his favor." Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168, 1171 (9th Cir. 1988).

1. Tie-in Claim

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Eastman Kodak Co. v. Image Technical Services, Inc., 112 S.Ct. 2072, 2079 (1992). Such an arrangement violates § 1 of the Sherman Act, 15 U.S.C. § 1, if the seller has

appreciable economic power in the tying product and if the arrangement affects a substantial volume of commerce in the tied product. Id. at 2079.

The parties have stipulated for purposes of the instant motion that HP had sufficient market power in the tying product market (software service) to restrain competition appreciably in the tied product market (hardware service) and that a tying arrangement imposed by HP would affect a substantial volume of commerce in the tied market. Accordingly, the sole issue before the Court is whether there is sufficient evidence that HP illegally tied the sale of software service to the sale of hardware service by representing to more than one or a few isolated HP system users that HP would not service the user's software unless the user also purchased hardware service from HP.

As evidence of an HP tying arrangement, Datagate proffers the declaration of Judy Lefkowitz, a former Datagate employee. In words reminiscent of facts presented in a law school evidence exam, Ms. Lefkowitz avers that the person responsible for awarding Beverly Hospital's HP service contracts told her than an HP representative told him that HP would provide software support only on the condition that the hospital purchase hardware service from HP. This assertion cannot be considered in determining the existence of issues for trial, as it would not be admissible in evidence as required by Rule 56 (e). The declaration, replete with hearsay, was not made on personal knowledge.

Similarly inadequate to withstand summary judgment is Datagate's reliance on the deposition of David Carver, an

HP officer. Datagate's statement in its opposition brief that Carver admitted that he discussed tying service to software maintenance with other HP officers misrepresents Carver's testimony. Carver testified only that he took part in discussions relating to competition between HP and Datagate for service contracts. Carver never said he discussed Datagate in the context of tying arrangements. Moreover, as HP points out, discussions of tying arrangements do not amount to evidence sufficient to create a triable issue as to the existence of a tying arrangement. There must be facts showing that tying arrangements were actually imposed.

Datagate also offers the declaration of Paul Lawrence, the president of Ideal Computer Services, an ISO which services HP hardware, and the interrogatory answers of Amtek, another ISO involved in litigation with HP. Both the declaration and interrogatory answers involve allegations that HP engaged in illegal acts to expand its hardware service business. Lawrence avers that some of his customers have told him that HP would not sell software service separate from hardware service. He further claims that other customers have said that HP coerced them into buying its hardware service by offering hardware and software services together at a lower price than the software service alone. These statements are inadmissible hearsay which the Court cannot consider when determining the existence of genuine issues for trial. Further, the evidence concerning the pricing practices of HP is not relevant to the claim at issue here. As previously stated, a tie-in claim must involve a threat to withhold a product unless the customer also purchases another product. While evidence of HP's pricing for combined hardware and software may be relevant to a

Section 2 monopolization claim under the Sherman Act, it does not raise a triable issue as to Datagate's Section 1 tie-in claim. The Amtek interrogatory responses relied on by Datagate also concern allegations that HP engaged in anticompetitive pricing practices. As such, this evidence is also inapposite to the instant motion.

The only probative evidence Datagate offers is the deposition of Robert Buckner, a Rockwell International employee who testified that HP employees told him that HP would not provide software service to Rockwell unless it also purchased hardware support from HP. According to Buckner, these representations forced Rockwell to purchase hardware support from HP instead of Datagate in 1986. Although this testimony constitutes evidence that HP engaged in tying conduct, a single incident of tying is insufficient to support a tie-in claim. As the Supreme Court has stated, "If only a single purchaser were 'forced' with respect to the purchase of tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." Hyde, 466 U.S. at 16. Evidence that HP coerced purchasers in addition to Rockwell is necessary to withstand summary judgment.

2. Injunctive Relief Claim

Plaintiff has effectively stipulated that it has no cognizable claim for permanent injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26. Statement of Plaintiff Regarding Injunctive Relief for Acts Occurring in 1986 at 1-2. Accordingly, Defendant is entitled to summary judgment on this claim.

CONCLUSION

For the above-stated reasons Defendant Hewlett Packard's motion for summary judgment is GRANTED as to all of Plaintiff's claims.

IT IS SO ORDERED.

DATED: November 17, 1993

/s/
ROBERT P. AGUILAR
United states District Judge

Copies of this Order were mailed to:

Francis O. Scarpulla
Attorney at Law
The Alcoa Building
1 Maritime Plaza
Suite 1040
San Francisco, CA 94111

Kurt W. Melchior
Nossaman, Guthner, Knox and Eliot
50 California Street
34th Floor
San Francisco, CA 94111

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DATAGATE, INC.,	)	
	)	
Plaintiff-Appellant,	)	No. 93-17276
	)	
v.	)	D.C. No.
	)	CV-86-20018-RPA
HEWLETT-PACKARD CO.,	)	
	)	
Defendant-Appellee.	)	ORDER
	)	

Before: GOODWIN, SCHROEDER and BEEZER, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judges Schroeder and Beezer vote to reject the suggestion for rehearing en banc and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DATAGATE, INC.,	)
	) C 86-20018 RPA
Plaintiff,	)
	) ORDER
vs.	) CONTINUING
	) MOTION AND
HEWLETT-PACKARD COMPANY,	) ORDERING
	) ADDITIONAL
Defendant.	) BRIEFING ON
	) ON NEW
	) EVIDENCE

I. INTRODUCTION:

The Court has received, read, and considered all papers submitted on the parties' motions for reconsideration. The matter has been deemed submitted without oral argument. Good cause appearing therefor, the Court finds and orders as follows:

II. THE POSTURE OF THE CASE:

On August 31, 1987, the Court issued an "Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment" (hereafter, the "Order"). There were two general issues raised by defendant in its motion. The first was the relevant market. The second was injury to competition. As to the issue of the relevant market, the

Court ruled that there remains a triable issue of material fact with respect to the identification of the proper market in this case. Regarding injury to competition, the Court concluded that plaintiff Datagate, Inc. ("Datagate") had failed to show that defendant Hewlett-Packard Company's ("H-P") practices "have harmed competition by injuring specific, already existing and practicing 3PMFs [i.e., third-party maintenance firms]." Order at 8. To the extent that Datagate sought to show injury to competition on that basis, summary judgment was granted against Datagate. This was not the termination of Datagate's case, however, for the Court found that Datagate had introduced sufficient declaration testimony to raise a triable issue as to whether H-P's conduct had injured competition insofar as that conduct chilled potential competition by inducing potential market entrants to refrain from entering the market.

After receiving the Court's Order, H-P brought this motion for reconsideration. The basis of H-P's motion is that Datagate does not have standing to litigate this case on behalf of the potential market entrants. Contrary to plaintiff's strident call for Rule 11 sanctions, the crux of H-P's motion is well taken. The only mistake made by H-P, if one could call it that, is to have dubbed this a motion for reconsideration. In fact, H-P is raising an issue not addressed in the Court's Order -- antitrust standing -- and the reason it was not addressed in the Order was because it was not raised in H-P's motion. In light of the Court's Order, however, antitrust standing properly has become the focus of dispute. Thus, although H-P has called this a motion for reconsideration, the Court views it as a motion for summary judgment on the issue of antitrust standing. Specifically, two issues are raised: (1) has Datagate suffered injury; and (2) even if Datagate has suffered injury, does plaintiff have standing under the antitrust laws to pursue its claims?

In addition to opposing defendant's motion, Datagate has brought its own motion for reconsideration. Datagate's motion is accurately denominated to the extent that plaintiff wishes a second chance to show that H-P has caused injury to firms presently competing in the relevant market. Like its opponent, however, Datagate slightly abuses judicial nomenclature when referring to this as a "counter motion" for reconsideration. In fact, the key aspect of the motion, if granted, would entail amendment of the Complaint. Such an amendment is properly described as a motion to amend the complaint under Rule 15 of the Fed. R. Civ. P..

In support of this motion, Datagate has filed multiple declarations, including submissions made in a federal court proceeding in Ohio. The court will address the "counter motion" before turning to defendant's motion regarding antitrust standing.

III. DISCUSSION:

(A) Datagate's Motion for Reconsideration:

The bases for Datagate's motion for reconsideration are five pieces of "new evidence." As will be seen, some of the evidence is new, but for the most part the evidence is the rehashing of prior allegations.

(i) Declarations of Blumberg, Gilbert, and O'Connor:

The declarations of Messrs. Blumberg, Gilbert, and O'Connor do not raise new evidence but instead repeat old allegations in a different form. Allegations of injury to Datagate and to competition generally are simply not enough. H-P is correct in assessing these declarations as

expressions of plaintiff's "disgruntlement at not having as many service contracts as it believes it should." Reply Brief at 14.

(ii) Deposition Testimony of Buckner:

The parties each offer their favorite portions of the deposition testimony of Robert Buckner, an employee of unspecified capacity with Rockwell International ("Rockwell"). Rockwell is a consumer for maintenance services of the sort supplied by H-P, Datagate, and other 3PMFs. Although Datagate omits reference to crucial pages, the gist of plaintiff's contention is that H-P told Rockwell that H-P software maintenance (H-P software is proprietary) was tied to H-P hardware maintenance. Rockwell allegedly renewed its contract with H-P in May 1986 because of H-P's threats.

H-P counters this testimony with several points. First, it appears that Mr. Buckner alone at Rockwell was privy to this threat. He never informed his superiors or sought legal advice. Second, although Buckner did tell Datagate about the threat, Datagate apparently had no immediate interest in Rockwell since it never submitted a bid for the May 1986 contract. Third, any fear that Rockwell experienced in the person of Buckner was quickly overcome in the fall of 1986 when Rockwell dumped H-P maintenance service in favor of a 3PMF operating locally.

Viewing the total picture, the Court finds that Buckner's declaration is too insignificant to raise a triable issue of material fact. Snatches of deposition testimony (for example, the crucial discussion between Buckner and H-P appears in snippets on pages 43, 47, 50, 53, and 59 -- Datagate omits the surrounding pages) are insufficient at this

point to raise triable issues. One person's undocumented understanding is not enough to show coercion in this context. Datagate has offered no evidence showing that H-P actually had a policy of tying hardware maintenance to software maintenance. Furthermore, Datagate already has stipulated to withdraw its illegal tie-in allegation. Therefore, the Court concludes that Buckner's "new evidence" is insufficient as a matter of law to raise a triable issue of material fact.

(iii) Five Declarations Filed in Ohio Federal Case:

Datagate believes that five declarations filed in a case in the United States District Court for the Northern District of Ohio "show extensive and threatened harm to existing 3PMFs all over the country" (hereafter the "Ohio declarations"). All five of the Ohio declarations focus on a particular action taken by H-P alleged to have severe anticompetitive effects on the market. Specifically, on August 1, 1987, H-P announced to 3PMFs that H-P was discontinuing four-hour or same-day response time for the service of H-P computers. More importantly, H-P informed users of H-P computers that such service would no longer be available to any customer not under a H-P service contract. As the declarations and letters of H-P customers attest, the effect of this policy change was to force many users of H-P computers to terminate or abstain from contracts with 3PMFs. This is because many customers require immediate or almost immediate service during computer breakdowns.

Defendant correctly points out that Datagate made no mention in its Second Amended Complaint (the "Complaint") of this aspect of H-P's service business. In essence, reference to this policy change is an attempt to raise issues of material fact by going outside the Complaint. Literally

speaking, defendant is correct in asserting that this evidence is irrelevant to the allegations in the Complaint. The question, then, is how to deal with the introduction of this new evidence. Rather than allowing the filing of a third amended complaint (which is the essence of Datagate's request), the Court hereby orders briefing on the issue of injury to competition raised by the Ohio declarations.

The court hereby continues the motion on antitrust standing (defendant's motion for reconsideration). The parties are to file briefs addressing the August 1, 1987 H-P policy change as a possible basis for showing injury to competition. The Court also welcomes argument on whether there is good cause for the filing of an amended complaint at this late stage in the litigation. Parties are to file briefs in support of their respective positions by November 6, 1987. Opposition briefs are to be filed by November 13, 1987. The matter will be deemed submitted without oral argument of November 20, 1987. Depending on the resolution of that issue, the Court will either set a hearing date for the antitrust standing issue or deem the standing issue submitted and issue a ruling without oral argument.

The Court hereby vacates the pretrial and trial dates in this case. New dates will be set subsequent to the resolution of the issues before the Court.

IV. CONCLUSION:

Good cause appearing therefor, the Court has continued defendant's motion for reconsideration and requested further briefing on one aspect of plaintiff's counter motion for reconsideration. Upon the receipt of all briefing on that motion, the matter will be deemed submitted without oral argument. Depending on the outcome of plaintiff's

motion, the Court will either set a new hearing date on defendant's motion or deem the matter submitted on the papers. At that time, the Court will determine whether new pretrial and trial dates are necessary.

IT IS SO ORDERED.

DATED: October 23, 1987

/s/
ROBERT P. AGUILAR
United States District Court

No. 95-1008

Supreme Court, U.S.
FILED
FEB 21 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

HEWLETT-PACKARD COMPANY,

Petitioner,

vs.

DATAGATE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RUEL WALKER
AW OFFICES OF
UEL WALKER
44 Montgomery, Suite 2500
San Francisco, California 94104
(415) 397-1578

FRANCIS O. SCARPULLA
Counsel of Record
LAW OFFICES OF
FRANCIS O. SCARPULLA
The Alcoa Building
One Maritime Plaza, Suite 1040
San Francisco, California 94111
(415) 788-7210

Attorneys for Respondent

8355
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

25 pp

QUESTIONS PRESENTED

1. Is there sufficient evidence of a coerced agreement in restraint of trade in violation of Section 1 of the Sherman Act when the record demonstrates that Hewlett Packard's tying policy forced Rockwell International (1) to transfer a service contract from Datagate back to HewlettPackard, less than a year after Rockwell had chosen Datagate and rejected Hewlett-Packard for the same contract because of Datagate's lower prices, and (2) to renew a different service contract with Hewlett-Packard even though Rockwell was unhappy with Hewlett-Packard's service and would have preferred to take advantage of Datagate's lower prices and better service?

2. When an antitrust plaintiff has demonstrated the imposition of a tie-in between two distinct products by a defendant with undisputed market power in the tying product, resulting in foreclosure of a volume of commerce that is "substantial" under the standards applied in all prior tying cases, should a federal forum be denied on the grounds that the plaintiff has been able to show the coercion of only a "single purchaser," pursuant to one sentence of dictum in this Court's opinion in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16 (1984)?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the petition identifies all parties in the court of appeals. Respondent Datagate, Inc. has no parent corporation and no subsidiary corporations.

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OPINIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

Respondent accepts petitioner's statement of the opinions below, statement of jurisdiction, and statement of the statutes involved.

COUNTER-STATEMENT OF THE CASE

The Ninth Circuit opinion in this case commented that, during the course of the appeal, Hewlett-Packard Company ("HP") had engaged in "persistent attempts to obfuscate the applicable legal standards." (Petitioner's Appendix [hereafter, "Pet. App."] at 15a). HP has continued this tactic in this petition by failing to discuss many of the underlying facts in the record that support the conclusions of the Ninth Circuit. An accurate and complete statement of the case demonstrates that HP's arguments are not supported by the record.

A. Hewlett-Packard's Actions Against Independent Service Organizations.

HP manufactures and services computer systems. After the expiration of the initial warranty period on its computers, HP sells annual service contracts for continuing maintenance for the computer system's hardware and software.

Respondent Datagate, Inc. ("Datagate") believed that HP's prices for computer hardware maintenance and support were unjustifiably high, and that HP did not meet its customers' needs in several important respects. Datagate entered competition with HP for a very specific and limited market niche, the maintenance and support of the hardware in HP "minicomputers," a mid-size computer system about as large as a speaker's lectern. Contrary to several statements in the petition, the market relevant to this

litigation is not hardware service for all HP computer systems, but only hardware service for HP minicomputers. (Appellant's Excerpts of Record [hereafter, "ER"] at 188).

Datagate was by far the largest of several "independent service organizations" ("ISOs") competing with HP for the hardware maintenance and support of HP's own minicomputers. Datagate was able to offer hardware maintenance and support service for HP minicomputers at prices significantly below HP's prices for similar service. (ER at 167).

Datagate and the other, smaller, ISOs were not able to offer maintenance and support service for HP's operating systems software, which depended upon HP's proprietary materials. Thus, HP had a virtual monopoly in the market for software maintenance and service for its computers. Software service was absolutely essential for owners of HP minicomputers, for the simple reason that computers will not function properly if the operating system software has a defect. HP indisputably had market power in the market for its software maintenance and support, and HP so stipulated for the purposes of the motion for summary judgment relevant to this petition. (ER at 188).

Responding to the increasingly successful competition from Datagate and a few other ISOs, HP developed and implemented a market plan to stem this competitive threat. HP planned to deny the ISOs access to HP parts, updates on operating systems software, hot-line service for faster parts delivery, and cost-saving assembly parts-exchange programs, to mention only a few of the many restrictions that HP imposed.

Datagate alleges that HP also engaged in other illegal and anticompetitive practices aimed particularly at Datagate, including the imposition of tying arrangements. One HP

employee, David Carver, gave deposition testimony that he had overheard or participated in discussions of HP imposing such tie-ins on customers, although he could not remember the names of the customers.[1] (Brief of Appellant at 28-34). Datagate also had evidence of numerous other specific tie-ins, (*id.* at 8-9), although this evidence was ultimately excluded as being hearsay. (Pet. App. at 20a-22a).

But Datagate had unequivocal and admissible evidence that HP imposed a tie-in on Rockwell International in Dallas, Texas ("Rockwell"). Originally, all of Rockwell's contracts for service of its HP minicomputers were with HP, but in 1984 Rockwell removed the contract for maintenance of the HP "1000 series" minicomputers and gave that service contract to Datagate instead. (ER at 98-99, 109). Rockwell was initially motivated by the fact that Datagate offered significantly lower prices than HP. (ER at 99). Rockwell was pleased with Datagate's service. (ER at 109).

In mid-1985, Datagate approached Robert Buckner of Rockwell, who was in charge of maintenance of a separate line of computers known as the HP "3000 series," and offered to bid on Rockwell's next contract for maintenance of this much larger system. (ER at 108). Mr. Buckner had a vague recollection of having heard that HP would not maintain the software unless it also had the hardware maintenance contract as well. (ER at 110). Therefore, he called Paul Voelker, HP's account representative for Rockwell. Mr. Voelker told Mr. Buckner that "it was his

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1. HP disputed that the Carver deposition was subject to this interpretation. The district court interpreted the deposition contrary to Datagate's position, holding that it did not offer evidence of additional tying arrangements. (Pet. App. at 20a-21a). On appeal, the Ninth Circuit did not reach the issue of whether the district court properly interpreted the Carver deposition. (Pet. App. at 15a, note 2).

understanding that HP would not support the software unless they supported the hardware." (ER at 118).

Mr. Voelker referred Mr. Buckner to Gene Hair, HP's district manager for software maintenance. (ER at 113-114). Mr. Buckner called Mr. Hair, who confirmed that HP had this tying policy. (ER at 107, 114-115). Mr. Hair said that he would call someone at HP's headquarters in California to confirm the company's position. When Mr. Buckner called back a second time, Mr. Hair confirmed that HP would not sell software support to a customer that did not purchase hardware support as well. (ER at 115, 118-119).

Knowing that it could not function without software maintenance and support from HP, (ER 112-113), Rockwell decided that it could not use Datagate for the HP "3000 series" service contract, even though Datagate was otherwise qualified for the contract and offered significantly lower prices, and even though Rockwell had been happy with Datagate's service and unhappy with HP's service. (ER 100-101, 109-110, 123). Instead, Rockwell gave the contract for service of the 3000 series to HP. (ER 123). Rockwell also canceled Datagate's existing "1000 series" service contract, which was taken from Datagate and returned to HP.[2] Datagate's officers testified that the HP 1000 series contract alone was worth approximately $100,000 a year. Rockwell told Datagate that the reason for the cancellation was HP's tying policy. (ER at 168).

Approximately one year later, in October 1986, Mr.

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2. Thus, the petition is misleading when it states that "Datagate never submitted a bid for the contract at issue . . . ." (Petition at 4). Datagate had actually been awarded one of the two contracts at that time, the 1000 series contract, but that contract was canceled and returned to HP. Datagate was foreclosed from bidding on the second contract, the 3000 series contract, by HP's tying policy.

Buckner was at a meeting with Doug Spreng, the general manager of HP's business computer division. Mr. Buckner asked Mr. Spreng if HP tied the purchase of hardware service to the purchase of software service, and Mr. Spreng said that it did not. When Mr. Buckner told Mr. Spreng that "he should inform the local field offices of that policy, because we had gotten some information to the contrary at the local level," Mr. Spreng did not inquire who had told Rockwell of this policy. (Appellee's Supplemental Excerpts of Record at 8-9).

During the entire history of this litigation, HP has never attempted to offer evidence that these conversations with Rockwell did not take place or that they were misinterpreted by Rockwell. Nor has HP ever offered evidence that its employees had been mistaken about HP's policies.

B. The Course of Proceedings Below.

Datagate's second amended complaint stated the following causes of action: (1) a violation of section four of the Clayton Act based on alleged violations of section two of the Sherman Act, for monopolization and attempted monopolization; (2) a violation of section one of the Sherman Act, based on illegal tying arrangements; (3) injunctive relief under section 16 of the Clayton Act; and (4) other relief in relation to pendent state law claims.

In September 1986, before there was any discovery on the illegal tie-in claim, the United States District Court for the Northern District of California, the Honorable Robert P. Aguilar presiding, dismissed the tie-in claim under Rule 12(b)(6), Fed. R. Civ. P., pursuant to HP's motion. The district court subsequently granted summary judgment on all remaining federal antitrust claims and dismissed the pendent state claims. The pendent state claims were then asserted under a state court action, which is currently on appeal.

The Ninth Circuit reversed the district court's dismissal of the tie-in claim, holding that Datagate's allegations were sufficient to meet the requirements of Fed. R. Civ. P. 8(a)(2). *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864 (9th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992).

Upon remand to the district court, HP filed a motion for summary judgment. The parties stipulated to (1) HP's market power in the tying product (software service) and (2) "that there was a substantial volume of commerce in the tied product (software service)." (ER 188). The petition argues that this amounts to a stipulation to two of the elements of a per se tying offense, leaving only the issue of whether HP imposed a tie-in.[3] But, as the Ninth Circuit opinion noted, at oral argument HP declined to concede that any tying arrangement it imposed affected a "not insubstantial" amount of commerce.[4] (Pet. App. at 6a).

After providing Datagate an opportunity for additional discovery, the district court, Judge Aguilar presiding, granted HP's motion, based on the conclusion that Datagate had to

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3. The third element of a *per se* tying offense is that the tie-in had an effect on a "not insubstantial" volume of commerce. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495-499 (1969), quoting *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6 (1958). Thus, a stipulation relating to the substantiality of the tied product market *as a whole*, as distinguished from the portion of the market that is actually foreclosed, does not relate to the specific terms of the third element of a *per se* tying offense.

4. This Court has affirmed the "substantiality" of a foreclosure of $60,800 in *United States v. Loew's, Inc.*, 371 U.S. 38, 49 (1962). As discussed in the Appellant's Brief at 21-22, the circuit courts and district courts have consistently held that foreclosures in the range of $50,000 to $100,000 are "not insubstantial." *See, e.g., Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1130 (6th Cir. 1981); *Moore v. James H. Matthews & Co.*, 550 F.2d 1207, 1216 (9th Cir. 1977).

present evidence that HP had imposed the tying arrangement on "more than one or a few isolated HP system users . . . ." (Pet. App. at 20a). The basis of the district court's conclusion was the "single purchaser" dictum from *Jefferson Parish*, 466 U.S. at 16.

On appeal from this grant of summary judgment, the Ninth Circuit reversed, rejecting HP's argument that "a tying arrangement affecting only a single purchaser is insubstantial as a matter of law." (Pet. App. at 7a). The Ninth Circuit panel concluded that this Court did not intend its "single purchaser" language in one sentence of dictum in *Jefferson Parish* to be a rule of general applicability in all *per se* tying cases, because such a general rule would lead to aberrant results. (Pet. App. at 7a-9a). Rejecting all of HP's other arguments, the Ninth Circuit reversed and remanded the case for further proceedings consistent with its opinion.

REASONS FOR DENYING THE WRIT

I.

THERE WAS ABUNDANT EVIDENCE THAT HP COERCED ROCKWELL INTO TWO DIFFERENT CONTRACTUAL AGREEMENTS THAT WERE AGAINST ROCKWELL'S ECONOMIC SELF-INTEREST AND PREFERENCE FOR SERVICE; THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THE RELEVANT LEGAL ISSUE.

Hewlett-Packard's first argument is that the Ninth Circuit's opinion in this case allowed a Section 1 case to be based on what the petition presents as "a buyer's mere acquiescence in purchasing the tied product in response to a seller's unilateral statement that it would otherwise withhold the tying product," contrary to this Court's holding in *Monsanto Co. v. Spray-Rite*

Serv. Corp., 465 U.S. 752. (Petition at 8). This argument is based on a flat misrepresentation of the facts in this case and a skewed analysis of decisions from two other circuits. When the relevant facts from the current case are correctly understood, it is quite clear that there was a coerced "agreement" in this case, and that the Ninth Circuit's opinion is in complete agreement with both *Monsanto* and the relevant opinions of other circuit courts.

The record below demonstrates that Rockwell had previously removed the contract for service and maintenance of the 1000 series minicomputers from HP and given it to Datagate, initially because Datagate offered significantly lower prices. (ER 98-99). This existing service contract between Rockwell and Datagate was worth about $100,000 per year to Datagate, (ER 168), and Rockwell was pleased with Datagate's service, (ER 101, 109).

Rockwell then became unhappy with HP's performance on another contract, for service of the 3000 series minicomputers, (ER 100), and Datagate asked Rockwell in mid-1985 if it could bid on this larger contract. (ER 108). Mr. Buckner's testimony indicates that Rockwell was very interested in giving this second contract to Datagate, to take advantage of Datagate's superior service and lower prices. (ER 98-101, 108-110, 111-112, 117, 123).

Rockwell's main concern[5] about giving the important 3000 series contract to Datagate was that HP would refuse to provide software service if it did not have the hardware service contract as well. (ER 110). Rockwell knew that HP's tying of the two services would "effectively preclude[ ] our consideration of any

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5. Although Rockwell was initially concerned about whether Datagate had personnel in Texas trained to service the 3000 series minicomputers, it later learned that Datagate did have such personnel. (ER 109, 123).

third-party maintenance on the computer system," because Rockwell "could not do without [HP's] software maintenance." (ER 117). Without functioning software, Rockwell's computers, and therefore its business, would be brought to a standstill.

Two HP employees, including HP's district manager for software maintenance, confirmed HP's tying policy to Mr. Buckner on three separate occasions. The third conversation occurred after one of these employees said that he would check with HP's headquarters in California to confirm the policy. Based on this information, Rockwell *removed* the existing 1000 series contract from Datagate and returned it to HP, and also renewed HP's service contract for the 3000 series, rather than exercise its preference for Datagate's lower prices and better service.[6]

The Ninth Circuit concluded that this evidence supports an inference "that HP's threats to some extent coerced Rockwell into making a purchase from HP it would not have made on the open market," noting that *Jefferson Parish* had stated that "the primary harm from tying arrangements is the impairment of competition on the merits in the market for the tied product." (Pet. App. at 12a). The petition, however, simply ignores this evidence and the Ninth Circuit's discussion, and instead tries to create the inaccurate impressions (1) that only the 3000 series contract was at issue and (2) that there is no basis to infer that Rockwell was coerced into its renewal of this single contract with HP.

The evidence omitted from the petition demonstrates that

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6. Datagate did not offer evidence of the value of the 3000 series contract, in part because the $100,000 value of the 1000 series contract alone was sufficient to establish a foreclosure of a "not insubstantial" volume of commerce, as measured in all prior trying cases. *See* note 4, *supra*.

the Ninth Circuit's decision below is completely consistent with *Monsanto*'s concerns that mere "acquiescence" to a unilateral demand is not sufficient, by itself, to establish an inference of concerted action, and that there must be evidence that tends to exclude the possibility of independent action. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 764. Both of those requirements are clearly met in this case. Rockwell was forced to reverse a decision it had made in favor of Datagate only a few months earlier, and to award two contracts against its own economic and service-based interests.

In view of the abundant evidence of HP's coercion of Rockwell, the petition's discussion of the Fourth Circuit's decision in *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680 (4th Cir. 1992) is inapposite. In that case, there was no evidence that the defendant had ever made the sale of its diagnostic software conditional upon the purchase of its repair services. Nor was there any evidence that the defendant had forced anyone to buy the tied product. (*Id.* at 686). In contrast, Datagate offered clear and undisputed evidence that HP had imposed a tie-in, and that this tying policy had coerced Rockwell into awarding two contracts on grounds that were contrary to Rockwell's financial and business self-interest.

City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992) also offers no support to HP's position. That case involved a natural gas supplier, Williams, who owned the only interstate pipeline serving the plaintiff cities. The plaintiff cities had "full requirements" contracts with Williams requiring them to purchase all their natural gas requirements from Williams, and requiring Williams to meet all of the cities' demands. Williams only transported its own gas over the pipeline. After applying for a federal permit to allow it to transport gas belonging to third party suppliers, Williams started a temporary program allowing

the plaintiff cities to purchase gas from third party suppliers and transport it over the pipeline. (*Id.* at 646, 650). For a period of time, Williams halted this temporary program and closed its pipeline to alternate suppliers, other than certain "approved third party suppliers." (*Id.* at 648). The cities sued for damages during the time period when Williams refused to allow its pipeline to be used for gas belonging to alternate suppliers, other than the "approved third party suppliers." The district court granted summary judgment for Williams on the grounds that there was no evidence of an agreement, and no evidence that Williams "forced" the plaintiff cities to buy natural gas from Williams. (*Id.* at 646, 650).

The Fourth Circuit affirmed, holding that the pipeline was not an "essential facility," and that the plaintiff cities had "reasonable access" to the pipeline even during the period of closure of the pipeline to suppliers other than the "approved third party suppliers." Because the plaintiff cities could purchase transported gas from *either* Williams or the approved third party suppliers, (*id.* at 648-649), there was no basis to assume that the cities had been coerced or forced into the sales contract with Williams. Therefore, this contract could not supply the element of an "agreement" under Section 1. (*Id.* at 650).

Even if *City of Chanute* were read as holding that a coerced sales contract for the tied product could not supply the element of a "contract [or] combination . . . in restraint of trade" under Section 1, that holding has been effectively overruled by this Court in its opinion in *Eastman Kodak*. In that opinion, this Court stated as follows:

> . . . Kodak contends that this practice [sale of Kodak spare parts only on condition that Kodak service be purchased] is only a unilateral refusal to deal, which does not

> violate the antitrust laws. [citation omitted]. *Assuming, arguendo, that Kodak's refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, its alleged sale of parts to third parties on condition that they buy service from Kodak is not.*

(*Eastman Kodak*, 112 S. Ct. at 2080, note 8) (emphasis added). This Court has also affirmed numerous cases involving a contract or agreement between the defendant and a coerced purchaser as the sole basis of Section 1 liability. *See, e.g., United States v. Loew's Inc.*, 371 U.S. 38 (1962); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 2-3 (1958); *International Salt Co. v. United States*, 332 U.S. 392 (1947).

In contrast to the *City of Chanute* case, there is abundant evidence that Rockwell was forced to return the 1000 series contract to HP and to award the 3000 series contract to HP, both decisions being contrary to Rockwell's experience of cheaper prices and good service from Datagate (on the existing 1000 series contract) and dissatisfactory service and higher prices from HP (on the 3000 series contract).

Thus, the Ninth Circuit's opinion in the current case is consistent with the Fourth Circuit's decision in *Service & Training, Inc.* and with the Tenth Circuit's decision in *City of Chanute*. All three of these circuit court decisions are also entirely consistent with this Court's opinion in *Monsanto*, and thus there is no conflict between the circuits justifying the grant of the petition in this case.

II.

THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THIS COURT'S "SINGLE PURCHASER" STATEMENT FROM *JEFFERSON PARISH* WAS DICTUM THAT APPLIED ONLY TO THE FACTS OF THAT CASE; THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THIS ISSUE.

HP next argues that the petition is justified because the Ninth Circuit erroneously determined that this Court's "single purchaser" statement from *Jefferson Parish* was based on the facts of that case, and did not represent a general rule or new requirement in a *per se* tying case. (Pet. App. at 8a-9a). The Ninth Circuit's analysis was the first *holding* by any court of appeals based upon this specific issue, and also represents the first thorough and thoughtful consideration of the issue by any federal court. Thus, there is no conflict in the circuits on this issue, and review by this Court may properly be postponed in order to determine whether other circuit courts choose to depart from the accurate analysis of the Ninth Circuit.

The three elements of a *per se* tying case were established by this Court in *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958) and *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969), and were recently affirmed in *Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S. 119 (1992).

These three cases, combined with *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 1 (1984), represent a clear and consistent determination by this Court that a tying arrangement presents a sufficient probability of anticompetitive effect to justify *per se* treatment and a federal forum, provided that three factors are present: (1) a tie-in between two separate products,

(2) sufficient market power in the tied product to *coerce* or *force* the tying arrangement, and (3) foreclosure of a substantial volume of commerce.

The second and third of these requirements, unique to tying arrangements as opposed to other Section 1 offenses, are the two additional "screens" that this Court has imposed on tying litigation under Section 1 to ensure that only tying cases containing a "substantial potential for impact on competition" receive *per se* analysis. (*Jefferson Parish*, 466 U.S. at 15-16; *accord Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 794-797). It is the potential for foreclosure of competition on the merits in the tied product, and extension of market power from the tying product market into the tied product market that provide the probable anticompetitive effects of tying arrangements that meet the three established requirements. *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 794-795. *See also, Eastman Kodak*, 112 S. Ct. at 2093, dissenting opinion of Scalia, J.; *Jefferson Parish*, 466 U.S. at 14-15.

In his dissenting opinion in *Eastman Kodak*, Justice Scalia noted that, when the three components of a *per se* tying offense are present, anticompetitive effect is presumed "without *any* inquiry into the practice's actual effect on competition and consumer welfare." *Eastman Kodak*, 112 S. Ct. at 2093, dissenting opinion of Scalia, J. (emphasis in original).

In contrast to the well-established and consistent body of case law setting forth the required elements and rationale for *per se* tying treatment, HP now argues that this Court intended in *Jefferson Parish* to establish a third and additional "screen" for *per se* tying cases, supposedly in order to ensure that there is a "substantial potential for impact on competition" from such cases. HP's proposed third "screen" is a requirement that the tie-in be imposed on more than a "single purchaser" in order to qualify for *per se* treatment.

Logic alone is enough to demonstrate the fallacy of HP's argument: the proposed additional "screen" simply does not fulfill the function that supposedly serves as its justification. A "single purchaser" in modern commercial markets can easily involve tens of millions of dollars in commerce, and thus the proposed rule will screen out tying arrangements that clearly *do* involve a "substantial potential for impact on competition." Conversely, the proposed additional rule would, by itself, allow very small transactions involving two or more purchasers to receive *per se* treatment. These "aberrant results" are the primary reason that the Ninth Circuit declined to interpret the "single purchaser" statement from *Jefferson Parish* as being a fourth element of a *per se* tying case. (Pet. App. at 8a-9a).

In fact, the proposed rule would achieve its stated end *only* to the extent that it achieved results that were co-extensive with the results achieved by the "substantial volume of commerce" requirement. Therefore, HP's proposed "screen" would serve no logical purpose *not already served* by the "substantial volume" requirement, and would be an unnecessary and harmful addition to tying analysis, often achieving results contrary to the purposes of the two current "screens" for *per se* treatment of tying cases.

The petition also frequently assumes that the proposed "single purchaser" rule is logical because it would somehow correlate to size of market share.[7] First, this argument is contrary to the strong language in *Fortner I* stating that market share is not

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7. The petition states at several points that the Rockwell contracts represented only "about 0.015% of the alleged tied product market," or some similar figure. (*See, e.g.*, Petition at 5, 26). That figure is without support in the record. It is based on the assumption that the relevant market was for service of *all* HP hardware. (Petition at 4, note 2). In fact, the relevant market was the much smaller market for service of HP minicomputers. (ER at 188). There is no record evidence of the size of this specific market.

a relevant consideration for purposes of *per se* tying analysis. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501 (1969). In addition, HP's argument on this point fails because simple logic indicates that a single purchaser can often have a quite large share of the relevant market, and multiple purchasers can often have a quite small market share. Once again, the proposed rule would often fail to achieve its supposed purpose, even assuming that purpose were relevant.

Finally, HP asserts that if the tying arrangement is imposed on only one purchaser, "there is no potential for 'significant' increase in the defendant's power over the tied product or impairment of 'competition on the merits' in the tied product market." (Petition at 20). That assumption would often not be true, as shown by the facts of the current case, where HP's well-timed imposition of a tying arrangement significantly delayed Datagate's expansion into the central Texas market, and Rockwell was forced to accept services from HP that Rockwell found both too expensive and unsatisfactory.

Nor is HP accurate in stating that the Second and Eighth Circuits have issued post-*Jefferson Parish* decisions with holdings contrary to the Ninth Circuit's opinion in the current case. *Gonzalez v. St. Margaret's Housing Development Corp.*, 880 F.2d 1514 (2d Cir. 1989) involved a suit by a large number of tenants in a nonprofit housing facility, claiming that the facility's requirement that they purchase one meal a day at the facility constituted an illegal tying arrangement. The opinion contains only a bare repetition of the relevant language from *Jefferson Parish*, not a holding or even a discussion of its meaning. Even if the opinion did contain a purported holding as to the meaning of the "single purchaser" statement, however, such a holding would be pure dictum in that case, because the meal-purchase plan was imposed on all tenants of the housing project, and the case thus involved multiple purchaser plaintiffs. (*Id.* at 1518-1519).

Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215 (8th Cir. 1987) is also inapplicable. Ryko was a manufacturer of automatic car-wash equipment, and Eden was one of Ryko's distributors, under a contract that prohibited Eden from selling competitive equipment. Ryko sued Eden, claiming Eden had violated its distributorship contract, and Eden cross-claimed for antitrust violations, among other things. Eden made a tying claim based on a letter from Ryko that the court of appeal found did nothing more than attempt to enforce Eden's obligations under the exclusive dealing provisions of the contract. (*Id.* at 1235). The opinion contains only a bare repetition of the relevant language from *Jefferson Parish*, and never discusses the meaning of this passage or bases any holding upon it. (*Id.* at 1236).

HP cites no other post-*Jefferson Parish* circuit court opinion reaching a holding on the meaning of the relevant language from *Jefferson Parish*, and Datagate is aware of none. Thus, the Ninth Circuit's opinion in this case is the first circuit court opinion to reach the relevant legal issue, and is also the first court to engage in a reasoned discussion of the legal issue. There is no conflict in the circuits justifying the grant of the petition.

III.

THIS COURT HAS RECENTLY AFFIRMED *PER SE* TREATMENT FOR TYING ARRANGEMENTS, AND THE CURRENT CASE WOULD BE A POOR FACTUAL CONTEXT FOR REEXAMINATION OF THAT RULE.

HP finally urges this Court to re-examine the application of *per se* analysis to tying cases in general. But HP ignores the fact that this Court affirmed *per se* treatment of tying cases only recently in *Eastman Kodak*. Even the dissenting opinion in that case was based upon an affirmation of *per se* analysis for tying cases, in the proper factual context. The *Eastman Kodak* opinion is based on nearly fifty years of jurisprudence affirming this rule: *see, e.g., International Salt Co. v. United States*, 332 U.S. 392 (1947); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 2-3 (1958); *United States v. Loew's Inc.*, 371 U.S. 38 (1962); and *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

Even if this Court were inclined to re-examine *per se* treatment of tying cases, however, the current case would provide a poor factual context for this reconsideration. First, the current petition is based on the Ninth Circuit's reversal of a summary judgment, and thus there is no substantive trial record showing how the tying agreement impacted the plaintiff, the effects upon the market for the tied product, or the impacts upon the third party upon whom the tie-in was imposed (Rockwell).

Second, the current case would provide no record or facts upon which to base a discussion of any possible pro-competitive aspects of tying arrangements, since the tie-in imposed by HP had absolutely no procompetitive justification, and HP made no attempt to offer such a justification before the trial court. HP had a virtual monopoly in the tying product (software service for HP minicomputers) that was extended into the highly competitive

market for the tied product (hardware support). The tie-in was a bald-faced anticompetitive act. Datagate was temporarily foreclosed from entering a new market and suffered the loss of two quite substantial contracts. And finally, Rockwell was coerced into giving two significant service contracts to HP, at higher costs and lower quality of service than could have been obtained from Datagate.

Thus, the current case is a classic situation for application of the *per se* rule, and there is nothing pro-competitive about the illegal tying arrangement imposed by HP. This is not the factual context for a consideration of the possible pro-competitive effects of tying arrangements. The petition should be denied.

CONCLUSION

For all of the foregoing reasons, respondent Datagate, Inc. respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

FRANCIS O. SCARPULLA
Counsel of Record
LAW OFFICES OF
FRANCIS O. SCARPULLA
The Alcoa Building
1 Maritime Plaza, Suite 1040
San Francisco, CA 94111
(415) 788-7210

W. RUEL WALKER
LAW OFFICES OF RUEL WALKER
44 Montgomery, Suite 2500
San Francisco, CA 94104
(415) 397-1578

Attorneys for Respondents

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HEWLETT-PACKARD COMPANY,

Petitioner,

v.

DATAGATE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

KURT W. MELCHIOR
ALISON S. HIGHTOWER
NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP
50 California Street
34th Floor
San Francisco, CA 94111
(415) 398-3600

ROBERT A. SKITOL*
JAMES A. MEYERS
WHITNEY L. ELLENBY
DRINKER BIDDLE & REATH
901 Fifteenth Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 842-8800

S.T. JACK BRIGHAM III
MARCIA HOWE ADAMS
HEWLETT-PACKARD COMPANY
3000 Hanover Street
Palo Alto, CA 94303
(415) 857-1501

**Counsel of Record*

Attorneys for Petitioner Hewlett-Packard Company

March 1, 1996

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ARGUMENT

Respondent's Brief in Opposition ("Opp." or "Opposition") highlights the importance of granting certiorari in this case to resolve important issues of tying law under Section 1 of the Sherman Act, 15 U.S.C. § 1. Respondent Datagate, Inc. ("Datagate") does not quarrel with the importance of the three questions presented in the petition. Nor does Datagate dispute that

a. the district court found probative record evidence of only a "single incident" involving a "single purchaser" acquiescing in the alleged tying conduct of petitioner Hewlett-Packard Company ("HP");

b. the court of appeals accepted that finding but deemed it sufficient to support a *per se* tying violation;

c. the court of appeals was able to do so only by treating this Court's "single purchaser" statement in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16 (1984), as a mere restatement of the "substantial volume of commerce" element of a *per se* tying violation, having no substantive or independent meaning;

d. the court of appeals held the "concerted action" element of a Section 1 tying claim satisfied by a showing that the purchaser acquiesced in the purchase of the tied product, despite this Court's holding in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984), that mere acquiescence of one party in the unilateral demand of another cannot suffice for this purpose;

e. the one incident that the court of appeals held sufficient to require a jury trial on Datagate's *per se* claim could not conceivably have affected competition, and its prosecution could not conceivably serve the purpose of antitrust law; and

f. the *per se* rule as applied in this manner chills conduct that may be procompetitive by imposing treble-damage liability without even asking whether there has been an anticompetitive effect or whether there was a legitimate business or efficiency justification for the conduct at issue.

1. ***Reconsideration of Per Se Rule.*** Datagate asserts that this case "would provide a poor factual context for" reconsideration of the *per se* rule because it "is based on the Ninth Circuit's reversal of a summary judgment." Opp. at 18. More specifically, Datagate contends there is no record evidence concerning either the competitive effects or the procompetitive aspects of the alleged tying arrangement. *Id.*

The state of the record in this case, however, supports the grant of the petition. Unlike *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 486 (1992), which involved a "sparse" summary judgment record uninformed by significant discovery, this case comes to the Court after 10 years of litigation on a completed summary judgment record. Unlike the plaintiff in *Kodak*, Datagate does not dispute that it was afforded "full discovery" (Pet. at 2) on its tying claim.[1] After such full discovery, Datagate was able to proffer only one admissible incident to support its allegation that HP tied software and hardware service.[2] In short, the record is adequate to address *all*

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[1] Datagate observes that the district court had dismissed its original tying claim pursuant to Fed. R. Civ. P. 12(b)(6) without allowing discovery on it. Opp. at 5. Datagate, however, does not dispute that it took full discovery on its tying claim following the reversal of that holding.

[2] Datagate contends that it "had evidence of numerous other specific tie-ins" but admits that "this evidence was ultimately (continued...)

of the questions presented, including the continued appropriateness of the *per se* rule. Neither further discovery nor a trial would provide any additional information relevant to these questions.

Datagate's observation (Opp. at 18) that there is no record evidence concerning competitive effects and procompetitive justifications simply proves HP's point. The whole purpose of the *per se* rule is to obviate such inquiries into competitive effects and procompetitive justifications. Thus, none of the evidence that Datagate claims is missing is relevant to a *per se* tying claim. Indeed, Datagate would object to such evidence as irrelevant. There is accordingly no reason to wait for any proffer of such evidence before deciding whether, as a matter of law, the *per se* rule should be abandoned.

While such evidence would be critical to any rule of reason tying claim, Datagate does not dispute that it "never attempted to establish a rule of reason tying offense." Pet. at 6 n.3. Accordingly, abandonment of the *per se* rule would be dispositive of this case.[3]

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[2] (...continued)
excluded as being hearsay." Opp. at 3. Datagate does not challenge the exclusion of the hearsay evidence.

[3] Datagate contends that "the tie-in imposed by HP had absolutely no procompetitive justification, and HP made no attempt to offer such a justification before the trial court." Opp. at 18. Since Datagate proceeded only under a *per se* theory, where procompetitive justifications are irrelevant, HP had no occasion to argue procompetitive justifications for the alleged tie. In any event, Datagate does not dispute HP's showing (Pet. at 29) that tying arrangements *can* have procompetitive effects, which is the relevant question in deciding whether to retain the *per se* rule.

2. ***Anticompetitiveness of Per Se Rule.*** In *Jefferson Parish*, neither the majority nor the minority questioned that tying can be procompetitive. The majority who retained the *per se* rule 12 years ago recognized that "not every refusal to sell two products separately can be said to restrain competition" and that "[b]uyers often find package sales attractive." 466 U.S. at 11-12. Datagate intimates that *Kodak* thereafter somehow settled the question whether the *per se* rule should be retained. Opp. at 18. In *Kodak*, however, this Court was not asked to and did not answer that question. As Judge Easterbrook recently observed, "Kodak did not undercut Hyde." *Digital Equip. Corp. v. Uniq Digital Technologies, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,260 at 76,138 (7th Cir. Jan. 16, 1996). The Seventh Circuit stated in *Digital Equipment* that the asserted tie between computer hardware and operating system software there at issue was procompetitive. *Id.* at 76,136 ("[C]ompetition is more vital, and consumers are better off, when it is possible to sell entire functioning units in boxes."). Plainly, tying arrangements can often be procompetitive and therefore should not be subject to *per se* treatment, particularly where the rule of reason continues to be available to remedy any anticompetitive ties.

Although the Seventh Circuit ultimately affirmed the pretrial dismissal of the tying claim in *Digital Equipment*, that case exemplifies the dangers of the *per se* rule. According to the Seventh Circuit, *Digital Equipment* was "a mundane commercial case" dressed up in federal antitrust garb. *Id.* at 76,138. Similarly, lured by the prospect of a treble damage award, Datagate has disguised what is at best a state tort claim as a federal antitrust suit. This is an apt illustration of how the *per se* rule proliferates inappropriate uses of the federal courts, at the same time chilling sellers from adopting entirely procompetitive arrangements for fear that they will be subject to treble damage liability. Review is necessary to reconsider this anticompetitive rule.

3. ***Multiple-Purchaser Requirement.*** The petition seeks review to clarify the statement in *Jefferson Parish*, 466 U.S. at 16, that "[i]f only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." Datagate contends that this multiple-purchaser condition that this Court required for the imposition of liability "would serve no logical purpose *not already served* by the 'substantial volume'" requirement of the *per se* tying offense. Opp. at 15 (emphasis in original).

To the contrary, the multiple-purchaser requirement fills a gaping hole left by the volume of commerce requirement, namely, the need to show that the alleged tie had an impact on *competition generally*. This case dramatically illustrates the point. The alleged tie affected an infinitesimal portion of the market and therefore posed no conceivable threat to competition.[4] Yet the court below found that *per se* liability could attach simply because the Rockwell contract at issue involved a not insubstantial number of dollars.

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[4] Datagate quibbles with HP's estimation that the Rockwell contract, which is the only alleged tying incident at issue in this case, represented about 0.015% of the purported tied product market by saying that HP included all HP hardware service, rather than just minicomputer hardware service, in its calculations. Opp. at 15 n.7. However, Datagate pleaded that the tied product market was for "service and repair of HP hardware systems." Second Amended Complaint ¶ 55. Moreover, HP's estimation of the size of the alleged tied product market was taken from Datagate's own estimation of the size of that market as stated in Datagate's brief to the Ninth Circuit in its first appeal in this case. *See* Pet. at 4-5 n.2. In any event, Datagate does not dispute that, however the tied product market is defined, the Rockwell contract constituted an infinitesimal portion of it.

The *per se* rule "focuses on the probability of anticompetitive consequences. . . . [A]s a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation." *Jefferson Parish*, 466 U.S. at 16. As this case demonstrates, while raising the specter of *per se* liability, the volume of commerce requirement alone does not ensure the necessary "substantial potential for impact on competition." A multiple-purchaser requirement of the sort articulated in *Jefferson Parish* is also required.[5]

In an effort to ward off inquiry into the multiple-purchaser requirement, Datagate now asserts that there were two different Rockwell contracts subject to the alleged tying arrangement. *See* Opp. at 3-4. This is the first time in the 10 years since this action began that Datagate has taken such a position. Datagate's new factual proffer is irrelevant since *Jefferson Parish* requires multiple *purchasers*, not merely multiple contracts of the same purchaser, to be subjected to the alleged tie.

In any event, Datagate's new factual proffer finds no record support. There is no record evidence that more than one

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[5] Datagate contends that there is no conflict among the circuits by asserting that, in *Gonzalez v. St. Margaret's Housing Dev. Fund Corp.*, 880 F.2d 1514 (2d Cir. 1989), and *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215 (8th Cir. 1987), there was "bare repetition of the relevant language from *Jefferson Parish*." Opp. at 16, 17. Such so-called "bare repetition" *confirms* that the Second and Eighth Circuits accepted the existence of a multiple-purchaser requirement. The court below squarely rejected that requirement. But for that rejection, the Ninth Circuit could not have breathed new life into this ancient case. Thus, the decision below creates a direct conflict among the circuits, requiring this Court's resolution, as to the meaning of the single-purchaser statement in *Jefferson Parish*.

Rockwell contract was at issue. The only support Datagate cites for the new proffer is the hearsay declaration of its president. That declaration refers only to a single contract and does not, as Datagate now contends, mention separate contracts for HP 3000 and HP 1000 series minicomputers. Appellant's Excerpts of Record (submitted to the Ninth Circuit) at 168.[6]

Datagate never argued to the court below that there were in fact multiple contracts. Instead, it admitted that there was only one contract at issue. *See, e.g.*, Plaintiff-Appellant's Brief at 8 (setting forth "Datagate's perspective on the Rockwell International *contract* that was lost to HP because of HP's tying arrangement"; emphasis added), 14 (noting "Datagate's evidence of a single tying arrangement"), *Datagate, Inc. v. Hewlett-Packard Co.*, No. 93-17276 (9th Cir. dated March 18, 1993). Datagate cannot raise a new factual matter before this Court that it failed to raise in either the district court or the court of appeals. *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 486 n.3 (1986); *see also New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970).

4. ***Concerted-Action Requirement.*** The petition presents the question whether there is the requisite "concerted action" under Section 1 if the seller unilaterally says to a purchaser that it will not sell the tying product unless the purchaser also buys the tied product, followed by the purchaser's purchase of the tied product. Datagate does not dispute the need to show concerted action, but

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[6] Datagate sprinkles miscellaneous assertions in its Opposition that Rockwell was "unhappy" with HP's performance, preferred Datagate's "superior" service, and was thus forced to accept HP's "unsatisfactory" and "lower quality" service as a result of the alleged tying in this case. Opp. at 4, 8, 10, 16, 19. HP disputes that the record supports Datagate's assertions, but in any event those assertions are irrelevant to the questions presented by the petition.

asserts that evidence that HP allegedly coerced Rockwell into purchasing hardware service from HP satisfies the concerted action requirement. Opp. at 10-12.[7]

Datagate has improperly conflated the concerted-action and coercion elements of the tying offense. The two are independent requirements, but Datagate treats them as if they were one. In *Monsanto*, 465 U.S. at 764, this Court held that mere acquiescence by one party in the unilateral demand of another is insufficient as a matter of law to show concerted action, thus making clear that "forcing" or "coercion" of the sort alleged by Datagate is not the concerted action required by Section 1.[8]

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[7] Datagate asserts that, "[d]uring the entire history of this litigation, HP has never attempted to offer evidence that these conversations with Rockwell did not take place or that they were misinterpreted by Rockwell. Nor has HP ever offered evidence that its employees had been mistaken about HP's policies." Opp. at 5. This is specious. It was entirely unnecessary for HP to put forward its side of the case when it could demonstrate a fatal defect in Datagate's claim. In any event, HP has in fact vigorously disputed that its employees made tying representations and has put Datagate on notice about its position. *See, e.g.*, Memorandum of Points and Authorities in Support of Hewlett-Packard Company's Motion for Summary Judgment Dismissing Tie-In Claim at 8 ("Mr. Buckner's deposition established that . . . *no* such tying condition existed."), *Datagate, Inc. v. Hewlett-Packard Co.*, No C86-20018-RPA (N.D. Cal. filed May 25, 1993) (emphasis in original).

[8] Datagate relies on *Kodak*, 504 U.S. at 463 n.8, to say that evidence of forcing or coercion is sufficient to show concerted action. Opp. at 11-12. As shown in the petition, however, Kodak had entered into written contracts with its equipment owners that expressly stated that Kodak would sell parts only to users who did

(continued...)

5. *Circuit Conflict on Concerted-Action Requirement.* The petition noted the conflict between the decision below and two other appellate decisions, *Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680 (4th Cir. 1992), and *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir.), *cert. denied*, 506 U.S. 851 (1992). Datagate asserts that there was no evidence of coercion in *Service & Training*, allegedly unlike here. Opp. at 10. But the existence of coercion was considered irrelevant in *Service & Training* because the basis of the Fourth Circuit's holding was plaintiffs' failure "to raise a genuine issue of fact as to the existence of an antitrust conspiracy between Data General and its CMO customers." 963 F.2d at 686.

Datagate attempts to distinguish *City of Chanute* by saying that the Tenth Circuit did not hold that a unilaterally imposed tie could not constitute concerted action. *See* Opp. at 10-11. As one district court recently stated in an opinion issued after the filing of the petition in this case, however, the "established rule" of *City of Chanute* is that "a unilaterally imposed tie does not satisfy the concerted activity requirement of § 1 of the Sherman Act." *In re Wang Labs., Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,288 at 76,312 (D. Mass. Jan. 4, 1996). Thus, there is a clear conflict between the decision below and both *Service & Training* and *City of Chanute*.

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[8] (...continued)
not use third parties for service, thus establishing concerted action. Pet. at 12 n.6. Datagate does not dispute the absence of any such language in HP's contracts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Kurt W. Melchior
Alison S. Hightower
NOSSAMAN, GUTHNER, KNOX
& ELLIOTT, LLP
50 California Street
34th Floor
San Francisco, CA 94111
Telephone: (415) 398-3600

S.T. Jack Brigham III
Marcia Howe Adams
HEWLETT-PACKARD COMPANY
3000 Hanover Street
Palo Alto, CA 94303
Telephone: (415) 857-1501

Robert A. Skitol*
James A. Meyers
Whitney L. Ellenby
DRINKER BIDDLE & REATH
901 Fifteenth Street N.W.
Suite 900
Washington, D.C. 20005
Telephone: (202) 842-8800

**Counsel of Record*

Attorneys for Petitioner
Hewlett-Packard Company

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